110-222

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1883.

ROBERT E. JENKINS, AS ASSIGNEE OF SAMUEL J. WALKER, A BANKRUPT, *Plaintiff in Error,*
vs.
BERTHOLD LOEWENTHAL, THE INTERNATIONAL BANK OF CHICAGO, C. EDWARD SCHOELKOPF, AUGUSTUS BAUER, JACOB ROSENBERG, AMOS P. GRAY, THOMAS H. SHEPPARD AND LOUIS SANDS, *Defendants in Error.*

No. 1232.

In Error to Supreme Court of Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

W. T. BURGESS,
Counsel for Plaintiff.

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In presenting a case to this court upon error to the Supreme Court of a State, the first inquiry always is that of jurisdiction in this court to review the action of that court upon the matters in controversy involved in the particular cause. As some may and others may not confer jurisdiction, it is necessary to advise the court as to what matters were in dispute, so that it may appear whether a decision has been made upon any of them, which this court has the power to review.

Statement of facts.

The record is very voluminous occasioned by the insertion of pleadings and decrees in other causes in it. The counsel in the cause have agreed to submit the case upon an abstract of the record sufficiently full as they think to present to the court the principal facts in the case.

Samuel J. Walker, the bankrupt, whose assignee brings this case here, is the common source of title of all the parties, to the land in controversy. He went into bankruptcy on his own petition the 26th April, 1878, and Jenkins was elected his assignee and received his deed as such on the 31st July, 1878.

Prior to January, 1873, Walker had dealt largely with E. Kinney & Co., a banking house in Cincinnati, Ohio, and became largely indebted to them. In that month he had a settlement with them and gave them in renewal of his indebtedness the eleven notes set out in the record, and also a deed of part of the lands in question, lots 21 to 34. Lowe's deposition, R. 31. Kinney R. 34. This deed, R. 60, is dated the 9th January, 1873. Recorded 21st Jan'y, 1873. The notes are dated the 10th Jan'y, 1873—4 of them at 8 months, 4 of them at 12 months and 3 of them at 18 months, so that they were all due when the assignee in bankruptcy received his deed. R. 2. In the January following, 1874, Walker gives another deed to Kinney on lots 35, 36 and S½ of 37 in the same block. R. 60. The same depositions show that this deed was for the same purpose as security, and otherwise neither of them had any consideration whatever.

These deeds were mortgages. Upon this point there is no evidence from witnesses contradicting it.

The statements to the contrary in the pleadings are all made by attorneys of the parties.

Walker before giving either of these deeds dealt quite extensively with the International Bank as a borrower of money from it, giving it securities in various forms. Loewenthal was president of this bank. Rosenberg its vice-president. A part of the securities held by this bank, and Loewenthal, Bauer, and Schoelkopf, as its assignees were six notes, in the aggregate $50,498.00, dated Dec. 30, 1871, due at from 30 days to 3 months, and as collateral he pledged to the bank three notes made by himself to his own order for $50,000, at 18 months, dated Dec. 29th, 1871, and a trust deed (R. p. 96), on these 16 lots and other property, dated the same day and recorded January 5th, 1872.

This is charged in the bill (p. 5 et seq), and admitted in the answers, (p. 15 et seq). Walker became insolvent, and did not pay his notes to these parties, and on the 27th of August, 1874, Bauer filed his bill to, among other things, foreclose the Rogers trust deed, making Walker, Kinney and many others, parties defendants (R. 47). To this bill Walker filed an answer setting up usury and denying any liability (R. 49). Kinney was defaulted on publication of notice (R. 52), and on the 25th of of April, 1878, final decree was rendered (R. 49), directing these lots to be sold; on the 24th of June, 1878, were sold by the master to Rosenberg, he bidding them off for the benefit of the bank, Bauer, Loewenthal and Schoelkopf, and paying no money (charged in bill, p. 7, and admitted answer, p. 16; proved by Loewenthal, p. 84.

On the 26 April, 1878, Walker filed his petition in

bankruptcy, was adjudicated bankrupt, and Robert E. Jenkins appointed "provisional assignee." Afterwards, on the 31 July, 1878, Jenkins was elected assignee, and received assignee's deed dated that day. The schedules filed with this petition. R. 13.

Schedule of "Creditors Holding Securities," gives "E. Kinney & Co., of Cincinnati, Ohio, bankers," as holding debt of $140,000.

Schedule of "Interest in Land," gives "Dock Lots 21 to 36, inclusive, in Block 10, S. J. Walker's addition to Chicago. Title held by Eli Kinney to secure any indebtedness due E. Kinney & Co., amount unsettled, also subject to trust deed, securing, with other property, $150,000 held by the International Bank as security."

On the 18 June, 1878, a writ of error was sued out of the Appellate Court to the Circuit Court on the decree in the Bauer case, in the name of S. J. Walker, in which Jenkins, as assignee, in Dec. 1879, was substituted as plaintiff error. This remained pending in that court until the '14 day of June, A. D., 1881, when the decree was reversed, and cause remanded.

The Bauer case is reported and a summary of the issues and matters involved in it is given in the report of that case. *Jenkins, assignee, etc.*, v. *Bauer, et al.* 8 Bradwell Report, 634.

Jenkins, as such provisional assignee, on the 19 June, 1878, filed in the U. S. Circuit Court, in his own name as provisional assignee, a bill in chancery, (R. 55) to enjoin the sale of this and other lands under the decree of April 25, 1878, making the bank, Bauer et al. parties, but not Kinney. This bill was May 27, 1879, on motion of the defendants, (R. 59), dismissed, the court denying a motion to make

Walker party plaintiff the object being to enable Jenkins as assignee to take the case up and prosecute it.

Kinney, 21 June, 1878, filed his petition under the Statute to be let in to defend in the Bauer case, (R. 52). On 22 June, 1878, the court, (R. 52), made an order allowing him to defend. On the 26 July, 1881, he filed an answer to the Bauer bill, (R. 52), and on the 21 April, 1879, a cross bill, (R. 53), not making Jenkins a party to it. This case remained pending in the circuit court, then in the Appellate Court, and was reversed and remanded there at the March Term, A. D., 1880, 6 Bradwell, 267, and was pending again in the circuit court until Nov. 25, 1880, when (R. p. 59), it was dismissed in pursuance of a stipulation given in Cincinnati, as part of the transactions of Kinney and Loewenthal, at that time and place hereafter alluded to.

On March 26, 1879, the bank filed in the Bauer case, (R. 96), a petition for the appointment of a Receiver to take charge of, manage and rent, with other lands, the premises in question, setting up the sale by the master under the decree of April 25, 1878, to Rosenberg for the use of itself, Bauer, Loewenthal, Schoelkopf of the premises in question on the 24 June, 1878, that the purchaser at that sale would not be entitled to a deed until Sept. 25, 1879, and that the premises were suffering irreparable damage by reason of waste, etc.; that no taxes had been paid for four or five years. (R. 99). This petition is set up in bill, (R. 7). On the same day Loewenthal was appointed Receiver, (R. 99), on notice to and consent of the assignee, by "mutual consent" (R. 101). This appointment is admitted by the answer, (R. 16).

Feb'y, 1877, Kinney through his agent, J. C. Dunlevy made, a lease to Christian Hupe and Frederick Kritenstein, dated that day, of Lots 31, 32, 33 and 34 in Block 10, with the privilege of digging clay and dirt in the river to manufacture brick, for two years from 1st April, 1877, at a rent of $250 a year, (p. 57). This lease was April, 1879, (R. 58), extended to March 31, 1880, and the rent paid in advance.

The election of Jenkins as assignee was contested. A. C. Badger, a large creditor of S. J. Walker, and working in the interest of creditors, took an active part in securing his election, (R. 42), and afterwards acted by and under the directions of the assignee in attempts to protect the estate in bankruptcy. (R. 43). It came out in the course of the trial in this case, (R. 68), that Kinney and Badger had made a contract about the litigation involved in the Bauer case. It begins, (R. 69) " Whereas Eli Kinney owns Lots " 21 to 36 in Block 10, etc., refers to suit of bank, Kohn and others which Badger is to defend, and be paid $12,000, and is to employ W. T. Burgess and J. N. Barker as Solicitors in the matter, is dated June 17, 1878. Their assent to such employment is in a letter of same date.

Badger endeavored to get Kinney to prove his claims at time Jenkins was elected, but he refused to do so, (R. 42), and told him the reason a few days afterward that the property he held in Block 10 was security, and there never had been a settlement between him and Walker (R. 42 and 92). This proof stands uncontradicted. Badger communicated the fact to Jenkins soon afterward. (R. 42),

On the 3 April, 1879, Loewenthal proves up an unsecured debt due him from Samuel J. Walker, for $22,040, in the matter of Samuel J. Walker, bank-

rupt, against his estate, before H. N. Hibbard, Register. The proof is produced at the hearing by the assignee (R. 41). It is signed by Lowenthal in person (R. 41) before the Register in whose office at the time was a copy of Walker's schedules.

March 22, 1879, Kinney gives J. N. Barker a power of attorney dated that day (R. p. 75) to lease any land he might own in Chicago, and to make, execute and deliver any contracts or agreements pertaining to his land in Chicago or Cook county. Some time in 1879, giving Loewenthal's version, (R. 84), negotiations commenced between Barker as the attorney of Kinney and Loewenthal for the renting of these premises pending this litigation. After several appointments for Kinney to be present, which were not kept, Barker and Loewenthal agreed to draft a contract and send it to Kinney. Loewenthal employed J. P. Ahrens as his attorney to draft it. It was submitted to Barker, sent to Kinney, he refused to sign it, and it was sent back, he with his attorney, J. J. Glidden, of Cincinnati, agreeing to come to Chicago to attend to it. They came, advised Ahrens, he advised Loewenthal, who then went to Barker's office (R. 85), " met Kinney there, and Mr. Glidden came in shortly afterward, *and then Mr. Burgess and Mr. Badger came in.* Then the points that Mr. Kinney objected to were all discussed." The agreement was soon afterward signed. It is at R. 66, dated 16 Feb'y, 1880, recorded Feb'y, 27, 1880.

It recites that a decree was, on April 25, 1878, rendered in Cook Circuit Court, in the case of Bauer, complainant, and S. J. Walker and others, defendants (G. D. No. 12,962), for sale of lots 21 to 36, in block 10, S. J. Walker's Dock Addition to Chicago, and that said lots were, on June 24, 1878, in pursu-

ance of said decree, sold by the Master "to said Jacob Rosenberg, who became the purchaser thereof, for the benefit of all the parties interested therein, under the provisions of said decree." That on Sept. 20, 1879, a Master's deed was made to Rosenberg. That "there is now pending in the Appellate Court for the First District of the State of Illinois, a writ of error sued out by Samuel J. Walker, *and now prosecuted by Robert E. Jenkins, his assignee in bankruptcy to reverse said decree;*" and there is also pending in said Appellate Court an appeal by said Eli Kinney touching certain matters in connection with said suit. And whereas it is deemed *by all the parties to said litigation, who are interested in said premises*, that the same during said litigation should be docked and put into a condition suitable for lumber yard purposes, and leased for the benefit of the parties interested therein." It then provides for the leasing of the property by Loewenthal and the signing of the leases by Rosenberg, their approval by Barker as the attorney in fact of Kinney, and the re-imbursement out of the rents of advances made by Loewenthal as fast as the same are collected. "That all of said advances, until they are fully refunded to the said Berthold Loewenthal, shall be and are hereby made the first lien upon said premises and every part thereof; said lien to be, and the same is hereby made, prior to all interests in the litigation aforesaid." That after the premises have been rented as aforesaid, Loewenthal shall collect all the rents and have sole control and authority over the tenants and of the premises under them until he is fully reimbursed for his advances and interest, and if so reimbursed before termination of litigation

shall continue to collect rent and have control of said premises, as aforesaid, until said litigation shall be disposed of, for the benefit of the parties who may then be under the decision of the Court, entitled to said premises and rents to which parties said Loewenthal hereby agrees to then account. therefor, and said Rosenberg agrees to assign said lease, or leases, to such party. That if said decree should be reversed in whole or in part, and said premises should be again sold, then the purchaser shall take the same, subject to the lease so to be made by the said Rosenberg, and out of the proceeds of such sale said Loewenthal shall first be reimbursed for all advances so to be made by him as shall then remain due him, and such advances shall be a first lien ahead of all mortgages and trust deeds upon said premises, and neither said Kinney, *nor any other person*, shall have any relief, except subject to the right of said Loewenthal to be fully repaid for all his advances."

Under this contract leases were made by Rosenberg to Gray & Sheppard (R. 70) and to Sands (R. 77) dated Feby. 25, 1880, under which they then entered and since have been and are in possession.

January 14th, 1880, the case of *Jenkins* v. *Bauer* on writ of error being then pending in the appellate courts, and the case of *Kinney* v. *Bauer* on his Kinney's cross bill also pending there, W. T. Burgess, the solicitor of Jenkins, served on A. M. Pence, of the law firm of Rosenthal and Pence, the solicitors in both these cases for the bank, Bauer, Loewenthal and Schoelkopf, a notice as follows:

CHICAGO, Jany. 14, 1880.

"*Messrs. Rosenthal & Pence,*
Solrs. for International Bank and others.

GENTS: I am told that attempts are being made for a compromise, between Eli Kinney and the parties whom you represent of the matters in litigation between them. As Mr. Jenkins, S. J. Walker's assignee in bankruptcy, is also interested in these matters, you are hereby notified not to proceed therein without his consent. Yours, &c.

W. T. BURGESS, solr. for Jenkins."

We come now to the purchase by Loewenthal which gave rise to the present suit.

At this date, November 8 to 20, 1880, the suit of Jenkins assignee of Walker against Bauer to reverse the decree in the Circuit Court was pending in the Appellate Court. Kinney had succeeded in opening the case upon his appeal to the Appellate Court and the account showing the usury in the transactions between the bank and Walker was open to be taken under the decision in the case of *Jenkins* v. *International Bank*, 97 Ill., 568, and Loewenthal acting for himself, the bank, Bauer and Schoelkopf undertook to buy out Kinney.

In November, 1880, having first advised with his attorneys in the pending suits, Rosenthal and Pence, Loewenthal goes to Cincinnati, the residence of Kinney, with this object in view. He finds out after his arrival there that the firm of E. Kinney & Co. went into bankruptcy and made a composition with the creditors of the firm, the terms of which do not appear in this case. That they gave him, Kinney, through his trustees named in this deed, Kyle and Dunham, a release dated March 7, 1878, of the claims

of the firm creditors, R. 63, on this Chicago property reserving from it a mortgage made by Kinney for $25,000 by way of indemnity to those creditors, dated March 1, 1878. He also finds that Kinney, his late partners Hurlburd and Lowe, joining with him, had made a deed to Charles L. Burgoyne, dated the 7th day of March, 1878, in trust for the wife of Kinney; and Burgoyne, in pursuance of that trust, had made a deed dated the same day to Martha S. Kinney, the wife of Eli Kinney. None of these conveyances had then been recorded except the mortgage, were all parts of one transaction, as Glidden says, R. 71, and so far as the record shows, no claim of title under them had ever been made, and, as Kinney says, R. 35, "it never amounted to any thing." The unrecorded deeds were then, Nov. 9, 1880, recorded, as the first act in this scheme to get this property for a mere song, one-tenth of its value, and, after a week's negotiation with Mrs. Kinney in claimed ignorance on his part of the character of Eli Kinney's title to these lands, Loewenthal procures from him and his wife a quit claim deed to Louis Kuhn, dated Nov. 16, 1880. Recorded Nov. 17, 1880, deposits $20,000 in the Banking Office of Kuhn, of which $10,000 is paid over and the other $10,000 is not to be paid (R. 88) until certain papers providing for the dismissal of the pending suits are found to be right. These papers are submitted to Rosenthal and Pence, (R. 90) and corrected by them, other papers sent back in place of them, including the release of errors signed by Kinney, and then, when they were received, about ten days or a fortnight after the deed to Kuhn, (R. 88) the remaining $10,000 was paid over when the deed from Kuhn to Loewenthal,

dated Nov. 16, 1880, same date as the deed to himself is recorded, Nov. 23, 1880.

The possession of the land at this time, November, 1880, was not, nor was it claimed to have been in Mrs. Kinney nor in Kuhn, nor did Loewenthal ever get or take possession under that purchase; but he himself was at that time in possession as Receiver.

At the time the bill of complaint in this cause was filed, the 27th May, 1881, the assignee's title to these lots stood affected of record, by —

1. The schedules in bankruptcy describing it as part of the real estate of the bankrupt subject to the Kinney notes.

2. The deeds absolute on their face from S. J. Walker to Kinney recorded before Petition filed.

3. The mortgage Kinney to Kyle & Dunham recorded Ap. 6, 1878.

4. The series of deeds from Kinney, Hurlburd and Lowe to Burgoyne, Burgoyne to Mrs. Kinney, Eli & Mrs. Kinney to Kuhn & Kuhn to Loewenthal, all recorded in November, 1880.

5. The pending suit in the appellate court prosecuted by Jenkins to reverse the decree in the Bauer case for the sale of the land.

6. The deed from the master under that decree to Rosenberg not a party to the suit and on the face of it conveying a perfect title.

The relief prayed for in that bill is for an answer without oath; that the title acquired by Loewenthal to said lands be declared and adjudged to be either a nullity, or to have been acquired and to be held in trust for complainant as such assignee, and Loewenthal be required to convey the same to him as assignee, and in the meantime and until further order of court, that Loewenthal be restrained from

selling, etc., said lands, and Rosenberg be restrained, etc., from selling, etc., said lands. That Rosenberg be declared to have acquired said master's deed subject to the result of said writ of error, and in trust for the bank, Loewenthal, Bauer & Schoelkopf, and to hold the title acquired thereby subject thereto, and for general relief, and makes the International Bank of Chicago, Charles E. Schoelkopf, Augustus Bauer, Jacob Rosenberg, Amos Gray, Thomas H. Sheppard, Louis Sands, defendants.

Upon this record Jenkins, the assignee in bankruptcy of Samuel J. Walker, claims that the land in question passed to him as part of the assets of Walker, subject at the date of his assignee's deed, to the lien created by the deeds to Kinney as mortgages for the payment of the Kinney notes, but subsequently discharged therefrom for two reasons:—

First. Because two years had elapsed after the assignee's deed was made and no suit brought on the notes to Kinney & Co., or to foreclose the mortgage on the land.

Second. Because by the transfers of the land by the deeds under which the defendants claim without also transferring to them the notes, the lien on the land was gone and the assignee held it freed therefrom.

To these the defendants say:

First. That the deeds were not mortgages, and

Second. That they are *bona fide* purchasers without notice.

Third. The two years' limitation of the Bankrupt Law.

Upon minor questions in the case the proof of a debt in bankruptcy by Loewenthal, and the bill filed

by Jenkins as provisional assignee against these defendants hereafter discussed claimed to be under the laws of the United States notice to them of his rights are rights claimed under the laws of the United States and depending upon their just construction as to their effect as notice.

As the property involved in this case is very valuable I hope the court will bear withme in a discussion of all the facts in the case and the law applicable thereto. Some may be such that this court has no jurisdiction of, but they tend to throw light on those that the court has.

ERRORS ASSIGNED IN THIS COURT.

1. That the Supreme Court of Illinois affirmed the decree of the Circuit Court of Cook County, whereas it should have reversed the same and remanded the cause that such relief might be given to the assignee as under his bill he was entitled to.

2. That it held the appellees were *bona fide* purchasers without notice.

3. That it held the assignee bound by the two years limitation.

4. That it did not hold the appellees barred by the two years limitation.

ARGUMENT.

On the 27th May, 1881, the bill in this cause was filed.

1. It charges (R. 2) that the deeds of January, 1873, and January, 1874, from S. J. Walker to Kinney were taken as security for certain notes made by Kinney to him, setting them out, showing when due and without any other consideration.

This is denied by the Answers, R. 13, and thus is formed the issue underlying all other issues in the case; for if these deeds were in fact as they were in name, *absolute conveyances*, there was an end of the complainant's whole case.

The Circuit Court in its decree dismissing the original bill made special findings (R. 25), and on this, *the main issue, it makes expressly no finding one way or the other* (R. 27), *and yet there is no evidence contradicting the statement that these deeds were so given.* It is true that there are statements in pleadings prepared by the attorneys, and in other matters not under oath apparently conflicting with this, but they scarcely call for explanation, and are easily reconciled with the true facts of the case, as sworn to by Walker in his desposition in the Bauer case (R. 44) and by Lowe & Kinney in their deposition. These were the only witnesses on the subject.

So that I shall take it as a fact conceded upon the proofs that these deeds were only mortgages, and that they are so is substantially conceded by the Supreme Court in its opinion.

2. This issue being thus disposed of, the bill further charges (R. 10) that the notes for which these deeds were held as security were due when the assignee's deed was made to him, have been at all times retained by Kinney, and never assigned to any one until some time in 1881, when he assigned them to Alpheus C. Badger, who then, when bill filed, held and owned the same (R. 5).

The answer admits (R. 17), "that said Kuhn never had or claimed to have or own said notes referred to in said bill as being held by said Kinney." The answer nowhere claims that they, Kuhn or Loewenthal, or any of the defendants, or Burgoyne or Mrs.

Kinney ever purchased any notes from Kinney, or have or had any right to these notes, but insists throughout upon a purchase of the land from Mrs. Kinney as the *absolute owner* thereof, and that they had no notice that it was such security if it were one. That settles it, and *the pleadings leave no issue open to proof* upon the question that they did not purchase the notes—and had no intention of doing so.

3. Then the only issue left is, had they notice that the deeds to Kinney were mortgages?

But showing that they had notice, then the question recurs, what relief is the plaintiff entitled to? and he claims:

4. That the land being separated from the debt charged upon it, the land being held by one and the debt by another, that the lien is gone and the land is discharged, and he, the assignee, holds the land discharged from payment of anything, and upon this point the Supreme Court of Illinois, in its opinion in this case is with me. But it may be as well to show that upon the authorities, the position is sound.

When a debt is evidenced by notes or other written evidences of debt, and secured by a deed absolute on its face, yet conveying lands to the creditor in fact as security therefor, a conveyance of the land by him to one who has knowledge or is charged with notice of the fact without also transferring to him the notes thereby, is a nullity—

Jones on Mort. §§804, 808, and cases cited; *Ellison* v. *Daniels*, 11 N. H., 274; *Parish* v. *Gilmanton*, 11 N. H., 298; *Aymar* v. *Bill*, 5 J., Chy. R., 574; *Jackson* v. *Willard*, 4 J. R., 41; *Weeks* v. *Easton*, 15 N. H., 148; *Bell* v. *Moore*, 6 N. H., 205; *Smith* v. *Smith*, 15 N. H.,

56-68; *Dearborn* v. *Taylor*, 18 N. H., 157; *Freebush* v. *Goodwin*, 24 Maine, 427.

Delano v. *Bennett*, 90 Ill., 533-536. It is said: "The bank deed made on the 1st day of October, 1831, assumed to convey the two-fifths which Warren conveyed to the bank, August 2, 1827. The conveyance which Warren made to the bank was clearly a deed of mortgage to secure the payment of $8,000 on his stock note to the bank. There is no pretense that the mortgage had ever been foreclosed, or that there was any transfer of the mortgage debt by the bank. The mortgage is deemed a mere incident to the mortgage debt, and the conveyance of the interest of the mortgagee in the land, without an assignment of the debt is considered in law as a nullity. *Jackson* v. *Curtis*, 19 Johns, 325; *Wilson* v. *Troupe*, 2 Cow., 231; *Jackson* v. *Willard*, 4 Johns, 41. We conclude then that the deed from the Bank, purporting to convey this two-fifths interest did not convey anything."

Merritt v. *Bartholick*, 36 N. Y., 45; where it is said; "As a mortgage is but an incident to the debt which it is intended to secure. (*Martin* v. *Mowlin*, 2 Burr, 969; *Green* v. *Hart*, 1 Johns, 580; *Jackson* v. *Blodgett*, 5 Cow., 202; *Jackson* v. *Bronson*, 19 Johns, 325; *Wilson* v. *Troupe*, 2 Cow., 231; *Cooper* v. *King*, 17 Abb., 342); the logical conclusion is, that a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it. The security can not be separated from the debt and exist independently of it. This is the necessary legal conclusion, and recognized as the rule by a long course of judicial decisions, (see cases above cited, also, 4 Johns, 41; 5 Johns, Chy., 570; 9 Wend. 80).

"Unless then the bond was, in effect assigned

with the mortgage, Wentworth obtained no interest in the mortgage. Did the bond or the debt which it evidenced pass to Wentworth? In the first place, the transfer of the mortgage did not of itself operate to transfer the bond, for the legal maxim is, *the incident shall pass by the grant of the principal, but not the principal by grant of the incident.* So that unless we are authorized to say that such was the intent of the parties we can not hold that it did."

But in the case at bar it is charged in the bill and admitted (R. 17) in the answer, that Kuhn, through whom Loewenthal gets title, "*never had or claimed to have or own said notes referred to in said bill.*"

How is it possible to hold that either he or Loewenthal under him got any title to this land.

The case cited says "that the said mortgage was so delivered to the said Wentworth before the same was assigned to said Campbell, but that the bond accompanying the same was not delivered to the said Wentworth at the time, nor was anything said about the same, nor is there any evidence that the same was ever delivered to said Wentworth, nor was there any writing executed in reference to such transfer."

5. But even if the notes had been transferred, no action on the 9th Nov., 1880, lay upon them against the assignee in bankruptcy, two years and upwards having then elapsed after the assignee received his deed, the 31st July, 1878. The assignee makes no tender of payment of these notes, and claims the property discharged from them; so that in either aspect of the case, either of separation of note from the debt or of the debt being barred by the statute of limitations, the assignee, if these parties knew that these deeds were but mortgages, was not bound

to pay or offer to pay them anything, and so his bill claims the land absolutely.

NOTICE TO DEFENDANTS.

Such being the effect of a transfer of the land without the notes or the notes being barred, as the deeds to Kinney to secure them were on their face absolute conveyances, the next question is that of:

1. Was Loewenthal a *bona fide* purchaser of this land through Kuhn from Mrs. Kinney for a valuable consideration fully paid without notice?

2. Are the pleadings in the case sufficient to base this defense on?

The bill charges that after said sale was made, and writ of error pending, the bank filed a petition entitled in said cause of "*Augustus Bauer* v. *Samuel J. Walker et al*," setting forth among other things, that said lots 21 to 36 had been ordered to be sold by the decree of the court of April 25, 1878; that the same had been sold under said decree to Jacob Rosenberg, in trust for all the parties interested in said securities as found by the court; that on the 24th June, 1878, a certificate of purchase was issued by said master to Rosenberg, and that he would not be entitled to a deed until September 28, 1879. That no taxes had been paid on the premises for four or five years; that Walker was insolvent and in bankruptcy; that said premises were going to waste, persons in possession committing waste thereon; that the premises, or a large part thereof, could be rented to advantage, and praying, among other things, that a proper person might be appointed to rent said premises, and to receive the rents and manage said estate under the order of the court, said petition being duly verified by the affidavit of said Loe-

wenthal filed therewith. That upon said petition on said March 26, 1879, notice of the presentation thereof having been given to complainant as such assignee, and he appearing by his counsel upon such presentation accordingly, an order was entered and made by said court, by which Loewenthal was appointed receiver, for the purpose of managing and taking care of, and protecting said lots of land with others, and renting the same and collecting the rents and dues, arising out of said real estate, and was thereby vested with all the rights and powers of a receiver in chancery, according to the practice of the court (he then and there having filed the bond as required by the order of the court), all contracts entered into by said receiver, and all leases made by him, should first be submitted to the court for approval, and had liberty to apply to court for further directions. That said Loewenthal forthwith entered upon the discharge of his duties as such receiver, took possession of said lands, received rents, issues and profits thereof, has never rendered any account of his receivership, and has not yet been discharged therefrom, and made no report of any kind as such receiver to the court, other than attempts to obtain possession of parts of the land and obtaining orders thereon.

That by means of the premises, complainant as assignee in bankruptcy of S. J. W., hath become and is entitled to said lands as part of the estate of said bankrupt, and that Loewenthal is not, nor are any of the persons through whom he pretends to claim title from Kinney, purchaser or purchasers of said lands for a valuable consideration, fully paid, without notice, and is and are not entitled to hold the same against him, the complainant, but he should be required to release and convey the same

to your orator as such assignee. That what if any interest, title or estate Loewenthal acquired or holds in said lands, he acquired and holds the same in trust for his co-defendants, the International Bank of Chicago, Augustus Bauer, C. Edward Schoelkopf as well as for himself, and that he holds the same for his and their joint use and benefit, and in fraud of the rights, estate and interests of complainant as such assignee as aforesaid in the premises.

By the answer it is admitted *that Loewenthal was appointed receiver as charged in the bill*, but that his appointment was limited to the time when a deed should be obtained by the purchaser at the foreclosure sale, and that he never acted or did anything in the premises as receiver, or received any rents out of said premises.

Now that he was appointed, on notice to Jenkins the assignee is admitted, and the only issue is upon the record, what was the extent of the order? Was there any limitation of it to the execution of a deed by the master to the purchaser at his sale? Inspection of the record shows that there was no such limitation and the proof shows, order of May 20, 1879, R. 84, that he acted as such with regard to these premises. That he was ever removed from his office as receiver is not pretended and consequently he remains such to this day, not only by the record but in fact.

So that the possession of this property was in fact in Loewenthal himself, receiver appointed on a petition of which the assignee, a party to the legal proceedings pending in which he was appointed had notice, appeared and consented.

The contract between Kinney, Rosenberg and Loewenthal expressly provides that Loewenthal shall

be reimbursed for his advances and interest and if so reimbursed before termination of the litigation mentioned in it "he shall continue to collect rent and have control of said premises as aforesaid, until said litigation shall be disposed of, *for the benefit of the parties who may then be under the decision of the court entitled to said premises* and rents to which parties said Loewenthal hereby agrees to then account therefor and said Rosenberg agrees to assign said lease or leases to such party."

The execution of that contract by Loewenthal is to be referred to the power that he had, and that was as receiver. He did not hold the legal title and his signature, except as receiver, was not of the slightest consequence to any one.

Now for him, *the receiver of the property*, to set up the purchase of an outstanding title as a *bona fide* purchaser is an absurdity.

And this possession acquired and held by Loewenthal as a receiver is not even alluded to in the opinion of the Supreme Court.

By the answer of the defendants they admit that Loewenthal acting for himself, Bauer, the bank, and Schoelkopf, in November, 1880, went to Cincinnati and "purchased said premises of the said Martha L. Kinney," and paid her therefor $20,000, and took a deed from her and her husband to Kuhn, which was duly made at the direction of Loewenthal, he paying the consideration for himself and the others above-named, and at the same time Kinney gave a release of all errors in said suit above referred to. That Kuhn made a deed of release to Loewenthal, as charged; that no consideration was paid except the $20,000 paid by Loewenthal. Admit that Kuhn never had or claimed to have, or

own said notes referred to in said bill as being held by said Kinney, and they deny that Eli Kinney at no time had any other title to said lands than as security for the payment of said notes referred to in said bill or any notes whatever. Deny that they knew said Kinney held said premises as security simply, and not absolutely, as the same appear of record, and deny that they had any notice that should have put them on inquiry as to the matter.

The answer also admits that Loewenthal was appointed receiver as charged in the bill, but that his appointment was limited to the time when a deed should be obtained by the purchaser at the foreclosure sale, and that he never acted or did anything in the premises, or took possession of the premises as receiver, or received any rents out of said premises. Admit that on 16th February, 1880, an agreement was entered into between Loewenthal, Kinney & Rosenberg, Trustees, for the leasing of said lands and premises, but deny that Loewenthal executed a lease as receiver, but alleged he did it as owner or part owner of said premises. Deny that since deed by Master to Rosenberg, September 27, 1879, Loewenthal has exercised any control over said premises, as receiver, or done anything in that character relating to said premises, and in another place they say that defendants Gray, Sheppard and Sands are tenants under Bank, Loewenthal, Schoelkopf and Bauer, who adopt all the allegations herein and ask the same protection as those under whom they claim, and in another place they allege that the deed from Eli Kinney to Burgoyne, and from Burgoyne to Martha S. Kinney, set out in bill, were for a valuable consideration; that she took said premises without any knowledge

on her part of the pretended claim set up by claimant, and believing that Eli Kinney was the owner thereof, and had the right to convey the same to Burgoyne, and that Burgoyne had the right to convey the same to her; that the consideration for said conveyance to her through said Burgoyne was fully paid at time of conveyance to her, and was not a nominal one but was a full and adequate consideration, and was all that said premises were worth. Allege that the quit claim deed to Kuhn, dated November 6, 1880, was made for a full valuable consideration to said Martha Kinney there then paid the sum of $20,000 paid at the time of the conveyance.

These pleadings fall far short of the rule laid down by this court in *Boone* v. *Chiles*, 10 Pet. 211 as to what shall constitute a plea of such a purchase. It is not set up that Kinney, Mrs. Kinney, Burgoyne, or Kuhn, at the time of the respective conveyances by them were or claimed to be in *possession of these lands.*

"The plea or answer must state the deed of purchase, the date, parties and contents briefly; *that the vendor* was seized in fee *and in possession.*" 2 White & Tudor, Lead. Cas. Eq. 100; citing cases of *Wallwyn* v. *Lee*, 9 Ves. 24; *Daniels* v. *Davidson*, 16 Ves. 252; *Tompkins* v. *Anthon*, 4 Sandford Chy. 97—122; *Jackson* v. *Row*, 4 Russell, 523.

Wallwyn v. *Lee*, 9 Ves. 24-32, says: "In this case the mortgagor was in possession of the estate, which is *prima facie* evidence that he was the owner of the fee simple. He was in possession of documents which would prove him to be the tenant in fee; if he dropped the settlement and withheld the act of parliament, the mortgagee, who without is a pur-

chaser for a valuable consideration, stood in circumstances that enabled this defendant to aver every proposition necessary to the plea of a purchase for a valuable consideration, without notice seeking to shut out the discovery: namely, that the vendor was the owner, or pretended owner—and, *which I conceive must be averred, that he was in possession.*

Daniels v. *Davidson*, 16 Ves. 248, 252. "To sustain the plea of purchase for valuable consideration without notice, the defendant must aver that the vendor was or pretended to be seized and that he was in possession."

Tompkins v. *Anthon*, 4 Sanford, Chy. 97, 122, commenting on the necessary allegations in a plea, says: "The plea ought to show an actual possession in the grantor (Metf. Pl. 275, Beames 243-4, 2 Daniel Chy. Pr. 200; *Jackson* v. *Row*, 4 Russell, 514, and several other cases cited in the treatise)."

Jackson v. *Row*, 4 Russell, 514, 524. "It is stated in the authorities that the party relying upon a plea of purchase for a valuable consideration without notice must aver that the vendor was seized, or pretended to be seized *and was in possession*, at the time when he executed the conveyance.

Baynard v. *Norris et al.*, 5 Gill. 468, 482. "Whenever the estate conveyed is one to which possession is incident, and is not a mere dry remainder or reversion, it is indispensably requisite to the validity of such a plea, that it should state that the grantor or mortgagor was, at the time of the conveyance, seized or pretended to be seized and was possessed of the premises conveyed; as authorities for which see Equity Draftsmen, 449, 3 Suyden Vendors, 345, 346. *Daniels* v. *Davison*, 16 Ves. 246; *Boone* v. *Chiles*, 10 Pet. 211.

"If to the validity of such a plea, the statement as to the possession of the grantor be essential, it is equally necessary when such a defense is relied on at the final hearing, that a like averment, as to such possession, should be made by the answer; and had such an averment appeared in the answer of the defendants *Morris* and *Jones*, it is conclusively disproved by the testimony in the cause. They cannot therefore protect themselves against the prior equity of the appellant by the defense relied on in their answer that they were bona fide purchasers without notice, etc.

The next question is, when, from, or through whom, and how did these parties purchase, and when did they pay the purchase money?

The chain of title interposed by them is:

1. Kyle & Dunham, trustees for the creditors of E. Kinney & Co., and on their behalf (R. 63) to Eli Kinney, dated March 7, 1878; recorded Nov. 9, 1880, (R. 62) reserving expressly (R. 63) the mortgage of March 1, 1878.

2. Eli Kinney, F. M. Hulburd and W. R. Lowe to Charles L. Burgoyne, in trust for Martha S. Kinney, dated March 7, 1878. Recorded Nov. 9, 1880; R. 63.

3. Charles L. Burgoyne, trustee, to Martha S. Kinney, wife of Eli Kinney, dated March 7, 1878. Recorded Nov. 9, 1880; R. 64.

4. Eli Kinney and Martha S. Kinney, his wife, to Louis Kuhn, dated Nov. 16, 1880, and recorded Nov. 17, 1880; R. 64.

5. Louis Kuhn to Berthold Loewenthal, dated Nov. 16, 1880. Recorded Nov. 23, 1880; R. 65.

The first three deeds are shown to be all parts of one transaction, (Glidden Deposition, R. 71) all bear

same date—all recorded at same time, Nov. 9, 1880, and between their date, March 7, 1878, up to date of Loewenthal's trip to Cincinnati in November, 1880, remain as though never executed. All this time Kinney acts about this land as though he had made no such papers; the Hupe lease was extended by him as to four of the lots in 1879. The contract with Badger in June, 1878; the contract to lease the whole in February, 1880; the power of attorney to Barker in March, 1879, all done by him alone. The only consideration, if any, proved, was the release of Mrs. Kinney's dower, not absolutely but by way of a security to trustees to secure the payment of composition notes not yet shown to have been foreclosed, or in danger of such foreclosure, and she had the most full and ample notice that these deeds, Walker to Kinney, were not absolute but held as mortgages. Lowe's Deposition, Rec., 32 which stands wholly uncontradicted.

The last two deeds are one of them to Kuhn, who paid nothing. Why this deed was made is not apparent unless the parties were afraid to trust each other, or Loewenthal wanted to put the title beyond the reach of attachment by Kinney's lawyers (R. 89) for their services rendered him (Kinney) in the case, and so while the negotiations were pending he put a cloud upon the title of Kinney by having these papers recorded. But no consideration was paid by Kuhn, and he makes a deed to Loewenthal of the same date, which is not recorded until the 23d November, 1880, after Loewenthal had had his solicitors, Rosenthal & Pence, pass on the sufficiency of the title he was getting (R. 90 et seq.) But Loewenthal, in behalf of himself, Bauer, the Bank, and Schoelkopf, paid the $20,000, getting

from the party holding the equity of redemption property worth from $200,000 to $250,000 for $20,000 —for what Walker owes the bank is in litigation, and what that debt will be found to be is a mere matter of conjecture.

This property is leased for $12,000 a year. Lease to Gray (R. 70), to Sands (R. 77), certain improvements are to be made on it. Contract (R. 66). Those are made at a cost of $30,000 (R. 86). Those leases dated Feb'y, 1880, have now run over three years, and have paid for these improvements, so that there is a clear rental of $12,000 a year. That represents $200,000 of capital at the very least, and the mortgagee dealing with the owner of the equity of redemption gets that property for $20,000.

Did the defendants at the time they paid the consideration for the conveyance to Loewenthal for their use, and the parties through whom they claim title from Kinney, know, or were they charged with notice at the time they respectively acquired title, of the fact that these deeds were not absolute, but acquired and held as mortgages?

Eli Kinney, the grantor of Burgoyne, of course knew.

Burgoyne was a figure-head; paid no consideration.

Mrs. Kinney is shown by Lowe (R. 32, —), to have had the most ample notice, and the proof stands uncontradicted.

Kuhn is shown by the defendants to be another figure-head.

And so we come to Loewenthal the Receiver who represents all parties, and acted for himself and the other three parties to this suit, the International Bank, Bauer and Schoelkopf, and notice *to him* was notice *to them*.

The complainant insists that these parties all stand charged with notice by reason of the following:

1. No one of the parties through whom they obtained title were in possession and never were.

2. The proof of debt in the bankruptcy proceedings April 3, 1879.

3. The letter of Jan'y 14, 1880, from the Solicitor of Jenkins to Rosenthal and Pence, the Solicitors of Loewenthal et al.

4. The testimony given by S. J. Walker in the Bauer case, Dec., 1876.

5. The appearance by Jenkins on and consent to the appointment of a receiver in the Bauer case, Nov. 26, 1879.

6. The bill filed by Jenkins as provisional assignee in the circuit court of the United States, June, 1878. 7. The contract of Feby/80 R. 66

1. *The want of possession.*

I have probably said all that is necessary on this point, but I insist further that the legal title needs no statute for its protection, Kinney shown to be a mortgagee was not in possession. Then he had a mere right and he must commence his action to foreclose in two years or be barred, and I refer to the case of *Locke et al.* v. *Caldwell*, 91 Ill. 419, as sustaining me in that position.

2. *The proof of debt against S. J. Walker in his Bankruptcy proceedings, by Loewenthal.*

This proof is to be found in page 40 of the Record; was made by Loewenthal in person the 3d of April, 1879, before the Register, approved by him and delivered April 9, 1879, to the assignee in bankruptcy, Jenkins, and by him produced in court.

The title to the property, which Jenkins, as such

assignee, seeks to set aside by these proceedings, stands in and was acquired by Loewenthal under the Kinney deeds in evidence in secret trust for himself and Bauer, Schoelkopf and the bank; he has been with them jointly claiming an interest in this property since Bauer's bill was filed, 27th August, 1874; obtained with them a joint decree in that case, under which a sale was made to and master's deed obtained by Rosenberg in secret trust for him jointly with them. So that whatever during that time charged him with notice, charges each and all of them.

1. A proceeding in bankruptcy is one suit from its commencement to the end.

Sandusky v. *First Nat. Bk.*, 12 B. R. 176.
Alab. & C. R. R. Co. v. *Jones*, 7 B. R. 145.
In Re York & Hoover, 4 B. R. 479.

Sandusky v. *National Bank*, 23 Wall. 289. At 292 it is said, "A proceeding in bankruptcy from the time of its commencement by the filing of a petition to obtain the benefit of the act until the final settlement of the estate of the bankrupt, is but one suit. The District Court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. Its proceedings in any pending suit are, therefore, at all times open for re-examination. Upon application, then, for relief in an appropriate form any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, providing rights have not become vested under it which will be disturbed by its vacation."

In Re York & Hoover, 4, N. B. R. 479, at page 487, it is said by Woods, J. "The proceedings in bank-

ruptcy, from the filing of the petition to the discharge of the bankrupt and the final dividend, is a single statutory case or proceeding."

Alabama & C. R. Co. v. *Jones*, 7 B. R. 145. At page 171 it is said by Woods, J. "In the Bankrupt Court, so far as relates to each particular case, there is but one term. The terms of the bankrupt court are not divided by vacations. The first section of the bankrupt act provides 'that the said (the bankrupt) courts shall be always open for the transaction of business.'" So that, from the beginning of a proceeding in bankruptcy to its termination there is but one term.

2. Proof of debt makes the creditor proving it a party to the bankruptcy proceedings.

Dingee v. *Becker*, 9 B. R. 508.
Wilson v. *Capuro*, 41 Cal. 454.

In *Dingee* v. *Becker*, 9 B. R. 508, a plaintiff having obtained judgment against his debtor, who afterward went into bankruptcy, and had delayed for some time procuring his discharge, proved his debt in the bankruptcy proceedings, and then issued an execution upon his judgment. The defendant moved to set it aside, and the court say, page 211, "Taking the whole act together and collecting its meaning from all its parts, the only construction which will reconcile the several parts, and which will bring the whole into unity and conformity is, that creditors who have proved their claims are temporarily barred during the pending of the proceedings in bankruptcy from pursuing their claims against the bankrupt in any other forum. We do not now consider the creditor's rights in regard to the enforcement of specific lien, but so far as concerns their personal

claims against the bankrupt they are conditionally discharged and surrendered. *By submitting themselves to the jurisdiction and becoming parties to the proceedings* they have precluded themselves from proceeding against the bankrupt in any other manner without the leave of the court which has acquired jurisdiction of their claims."

P. 513. "In the present case the plaintiff, having made himself a party to the proceedings in bankruptcy by proving his debt there, could not lawfully pursue the bankrupt by an execution from this court for the same debt, while the defendant's application for a discharge was pending there. If there has been unreasonable delay his remedy is in the Court of Bankruptcy, which by his own act has acquired complete and exclusive jurisdiction of his rights. He must go there to remove the impediment which he has placed in his own path before he can proceed here."

Wilson v. *Capura*, 41 Cal. 545.

The defendants were adjudicated bankrupt. The plaintiff proved his claim in the Bankrupt Court, and then sued the defendants on it, the bankruptcy proceeding still pending, and it was held that he could not maintain the action. The Court saying at p. 551, that "It is the intent of the act that the Federal tribunals shall have the exclusive control of the assets of the bankrupt, and shall distribute the proceeds among his creditors."

3. Bankruptcy proceedings are analogous to a bill filed by one creditor on behalf of himself and all other creditors, when a receiver has been appointed of the property of the debtor. *Upton* v. *Hansbrough*, 10 B. R. 369. *In re* Leland, 10 Blatch-

ford, 503; *in re* Hinds, 3 B. R. 351; Bump on Bkcy., § 5044. See his notes on "Representative Character."

In *Upton* v. *Hansbrough*, 9 B. R. 379, Hopkins, J., in speaking of the powers of an assignee to levy an assessment on the stockholders in a corporation liable for its debts, uses the following language referring to a matter wherein the company as between itself and its stockholders could not enforce an assessment: says "such is not my understanding of the authority of an assignee in bankruptcy. I think he represents the interests of the creditors, is a trustee for the benefit of the creditors, and any defense that would not be good as against them in an equitable suit is not maintainable as against an assignee in bankruptcy. *His position is analagous to that of a receiver appointed by a court of chancery.*"

The questions involved in that case went to the Supreme Court of the United States, in the case of *Sawyer* v. *Upton, assignee*, 91 U. S. Rep. 56, where the principles of that case are affirmed.

In re Leland, 10 Blatchford, 503, where it is said, page 507, "The proceedings in bankruptcy arrest the ordinary proceedings of creditors to obtain judgments, and thereby to secure an appropriation of the debtor's property to their use, and the assignee in bankruptcy represents them. *He is trustee for them*, and whatever right they might assert as creditors, if they had obtained judgments, he may, for their benefit, assert, whether it be to set aside conveyances by the bankrupts, which are fraudulent and void as against creditors, or which are otherwise as against them invalid."

In re Hinds, 3 B. R. 356, it is said, "The proceedings in bankruptcy commenced by one or more of

the creditors of the bankrupt, for the benefit of all, are in the nature of an equitable attachment as against the equitable estate of the bankrupt, and the assignee as the representative of all the creditors of the bankrupt, and whose title relates back to the date of the filing of the petition, thereby becomes the owner of such equitable interest, with an equity superior to a judgment creditor who has an execution returned unsatisfied but who had obtained no equitable lien by filing a creditor's bill or taking other proceedings to reach such equitable estate. The commencement of the proceedings in bankruptcy may well be regarded as an equitable attachment, and as it is a cherished rule of courts of chancery that "equality among creditors is equity," such courts would give effect to such equitable attachment, and preserve the rights thus acquired for the benefit of all the creditors of the bankrupt, even if the legal title of the assignee did not relate back to the filing of the petition.

Sawyer v. *Hoag*, 17 Wall. 610, at page 619, speaking of a transaction that as between a bankrupt corporation and its stockholder upon a stock subscription, the terms of it might bind them, yet as to creditors would not, says: "And on this consideration one of the main arguments on which the appellant seeks to reverse the decree stands. He assumes that the assignee in bankruptcy is the representative alone of the corporation, and can assert no right which it could not have asserted. The weakness of the assignment is in this assumption. The assignee is the representative of the creditors as well as the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property rights and

credits, where the bankrupt could not have sustained the action. and to set aside as void transactions by which the bankrupt himself would be bound. All this, of course, is in the interest of the creditors of the bankrupt.

Now if the assignee thus is clothed by law with rights for the benefits of creditors, it is only for those who prove their debts.

Sec. 5091. "All creditors whose debts are duly proved and allowed *shall be entitled* to share in the bankrupt's property and estate, *pro rata*, without ano priority or preference whatever, except as allowed by section 5101."

Loewenthal complies with this provision. He intervenes in a pending suit, to obtain the property and estate of his debtor, and divide it *pro rata* among those who, like him, also come in and prove their debts. In the proceedings, part of that suit, this property is described as part of the assets of the bankrupt subject to a lien he himself has for another debt against the bnnkrupt. He is supposed to examine what is before him. He becomes an actor; he claims his *pro rata* share, submits himself to the jurisdiction of the court, precludes himself from suing elsewhere. As he gets some advantages, so he waives others; and before he obtains the one or waives the other, is presumed to have done it intelligently. Then he knew that this property was put down in Walker's schedules as Walker's property subject to the deed to Kinney as a mortgage. He is concluded to deny it because notice by the record is one of which ignorance can not be pleaded.

The law conclusively charges a man with notice of the contents and effect of proceedings in court against the property of others which he institutes,

adopts or seeks the benefit of to satisfy a debt due himself. He can not claim benefits without taking burthens.

3. *The letter of Jany. 14, 1880, to Messrs. Rosenthal & Pence.*

That letter is as follows:

"MESSRS. ROSENTHAL & PENCE,
Solrs. for International Bank and others.

GENTS: I am told that attempts are being made for a compromise between Eli Kinney and the parties whom you represent, of the matters in litigation between them. As Mr. Jenkins, S. J. Walker's assignee in bankruptcy, is also interested in these matters, you are hereby notified not to proceed therein without his consent. Yours, etc.,

W. T. BERGESS,
Solr. for Jenkins."

At the time this was served, the 14th January, 1880, there were pending two suits; one in the Appellate Court on the original bill, and the decree rendered thereon, to which Jenkins had then become a party, and the other on the cross-bill of Kinney, filed April 21, 1879, in the Circuit Court, against these parties, but to which Jenkins was not a party.

A captious criticism may be indulged in as to what was meant by "matters in litigation between them" in which the assignee was also interested. But "notices" are not "special pleas." It is enough if they put the parties on inquiry.

It was not necessary to notify them that the assignee had an interest in the state of the account between Walker and the Bank; that any and everybody knew, that had any sense. To restrict the

notice to that would deprive it of any occasion for giving it. It then could *only* refer to the land that was involved in the suit, and was a clear and unequivocal notice as to that, that Jenkins claimed an interest in it.

Loewenthal shows that after this notice was given, negotiations for a settlement of the matters in litigation were opened and carried on, at intervals, from February, 1880, when the contract for leasing was signed during that summer. R. 87. He there says, "I am quite confident that I never said to Mr. Pence or Mr. Rosenthal in regard to this conversation with Mr. Glidden nor in regard to the letters which I received from him (referring to letters from Glidden, proposing a settlement) *nor did I ever, until a day or two before I started to Cincinnati communicate with Mr. Pence any intention on my part to go there for the purpose of acquiring the Kinney title.*

"Mr. Burgess: *And settling the suit?*

"*A. Well, that carries it with it, I suppose.*"

That brought this notice into full force. Of course, if notice can not be given in anticipation of wrong-doing, it would be useless to give it after the wrong-doing was consummated. The fact is here established that he consulted with his attorneys, who had always had in charge that litigation (R. 83), and of course had it when the notice was served, before going to Cincinnati "for the purpose of acquiring the Kinney title." When he got there he did not close up the transaction until the papers, then taken, part of that transaction, had been supervised, corrected, and re-written under the direction of these same attorneys, and signed by Kinney, (see the cross-examination of this witness, p. 90, where,) after much dodging and some prompting

from his own attorney, he finally admits the facts.

Now, then, the law conclusively presumes that Mr. Pence did his duty in the matter and notified his clients of the notice served upon him. His services were actively required by his clients to do an act for them which the notice forbade their doing in connection with the very litigation of which he had charge for them when the notice was served and when the suit was settled.

That a settlement of a suit is one of the powers delegated to an attorney by his client in his original employment of him as an attorney at law, the case of *Haas* v. *Chicago Building Society*, 80 Ill. 250, settles as clear law so far as this State is concerned. For there the attorney stipulated away the whole of his client's cause of action, and the Supreme Court of Illinois sustained the decree rendered upon it as made under a power unquestionably conferred upon him by his client by his mere employment as such.

4. *Walker's Deposition in the Bauer suit.*

When Kinney placed his deed on record, Jan'y 21, 1873, the bank held two of the notes secured by the Rogers trust deed, $100,000 and interest, the amount due on which Jan'y 15, 1878, was $148,355.54, R. 631, to secure six notes, the gross amount of which due at the same date was $69,579.88. The bank, after the date and record of Kinney's deed, Jan'y 21, 1873, takes principal notes from S. J. Walker, found and described in said decree, R. 50, the gross amount due on which as stated above at that date, Jan'y 15, 1878, was $82,168.15, *and which by this decree are charged upon these premises prior to Kinney's deed.*

So that upon the face of the record in the Bauer case the question of the priority and consequently

the consideration for the deeds to Kinney were material to be inquired into. The testimony in the case then is notice upon those points to the parties who in that proceeding claimed title to this properiy, and are parties to the issues in it, and who were by the decree in it found to have liens prior to the deed to Kinney. It is in a deposition, part of the record under which they claimed title to this property under a sale made for their benefit at the date of this transaction, Nov., 1880, standing unreversed. The testimony of Walker in that case as to this deed is notice to Bauer, Loewenthal, Schoelkopf and the bank, *by matter of record* of the most solemn character in a cause, wherein they on the one side and Walker and Kinney on the other, were parties to the issues in it and in favor of whom and against whom decrees were rendered, touching this very property.

In that testimony S. J. Walker, in response to their solicitor, says, among other things: "I further state that I conveyed this property to Mr. Kinney for the purpose of securing a settlement in case I could relieve it. They at the time of my conveyance not paying me any money consideration whatever the object being to secure a settlement with them if possible on the most favorable terms possibly." *Board of Supervisors* v. *Mineral P. R. R. Co.*, 24 Wis., 93, 121.

5. The appearance by Jenkins on and consent to the appointment of a receiver in the Bauer case.—

The petition for this appointment and the order thereon is at R. 96–99.

It will be seen that this order does not recite notice to any one. At that date, March 1879, the Bauer case was pending in the appellate court. The bill by Jenkins as provisional assignee against these

defendants was pending in the U. S. Circuit Court. Kinney had been, June 22, 1878, let in to defend the Bauer suit, but had not filed his cross-bill. (Filed April 21, 1879.)

As this appointment is in the bill charged to have been made on notice to the assignee and admitted by the answer to have been so made "that Loewenthal was appointed Receiver as charged in the bill" the legal consequences flowing from that state of facts I have already commented upon.

6. *The bill filed by Jenkins as provisional assignee in the United States Court.*

This is a suit (R. 55) to which Kinney was not a party, the *quartette* were. The bill was filed June 19, 1878, sets forth "upon information and belief," (R. 55) that Walker had filed his petition to be adjudicated bankrupt, was willing to surrender all his estate and effects for the benefit of his creditors, and *attached to his petition the schedules required by law;* that he was thereon duly adjudicated bankrupt, and by order of court he (Jenkins) was duly appointed provisional assignee in bankruptcy, with full power to act as such until an assignee should be appointed in said proceedings for said Walker and his estate. It then sets out the printed slip of the advertisement for sale under the decree in the Bauer case for the 24th June, 1878, in which is included, Lots 21 to 36. It then sets out the filing of the bill by Bauer on the 29th August, 1874, and gives part of its contents, repeating the language of that bill in regard to these lots, and giving part of the prayer of the bill. (It was admitted, that the substance of the answer of Walker to this bill was also set out, but "that in setting out the substance of the answer there is no allusion made to the Kinney deed what-

ever.") The bill then sets out, that Jenkins had filed in the Bauer case a certified copy of order of adjudication, and his appointment as provisional assignee, and had moved the Circuit Court, before the close of the term in that case, to vacate the decree, which it refused to do; that he then moved to be allowed to take an appeal in the name of Walker, and the court refused it. "That being advised that it was necessary to protect the interest of said estate in bankruptcy," Walker not being able to take and perfect the appeal prayed by him, he (Jenkins) had on the 18th June, 1878, sued out a writ of error from the Appellate Court on said decree, and the cause was then pending in that court on that writ, and that such errors had intervened in the said proceedings, and decree that they would be reversed, and the estate and effects covered by said decree released from the liens respectively claimed thereon, or the amount greatly reduced to the great benefit and advantage of the estate of said Walker in bankruptcy. That the parties will proceed with such sales whereby "great and irreparable injury will be occasioned to the estate of said bankrupt." That the matters involved and in controversy in said suits amount in value to about one million of dollars, and the interest of the bankrupt estate therein over and above those of *other parties interested in some of the property* is $500,000. Prays the court to take jurisdiction of the matter, and "for a more particular statement of the various instruments in writing referred to in this bill of complaint," prays leave to refer to the same when produced. Prays for an injunction staying sales under the decree, including the lots in question.

This bill, in connection with the schedules re-

ferred to, and made part of it, was ample notice to the defendants that the lands touching which an injunction was asked, were claimed to be a part of the estate of the bankrupt. Jenkins, "as assignee," came in on the 23d May, 1879, R. 59 and moved for leave to file a supplemental bill in the case, on notice to these parties. That was before Loewenthal got this deed, and, if the original was not, certainly that was most ample notice that he was claiming these lands.

7. *The contract for letting these premises of Feby 16, 1880, R. 66.*

This contract is signed by, 1. Rosenberg, holding title under the decree for Loewenthal, the bank, Bauer and Schoelkopf; 2. Loewenthal, who, by consent of the parties had been appointed Receiver, generally and for no limited time, of the premises, and had never been discharged; and 3. Kinney.

The negotiations for it are commenced by Barker who had a power of attorney from Kinney to lease the premises, dated March 12, 1879, R. 75, on the part of Kinney. No one else appears to have acted as agent in the matter for anyone until the interview in Barker's office just before the papers were signed, according to Loewenthal, see his testimony, R. 84, 85, where he says, "went to Mr. Barker's office and met Mr. Kinney there, and Mr. Glidden came in shortly afterward, and *then* Mr. Burgess and Mr. Badger came." Now this is the first intimation that Loewenthal had of intervention of either Badger or Burgess in the matter, for the purpose of leasing.

And the pertinent question for him to have asked under these circumstances at the time was, how did they come to be there? What reason had they to be there?

At this time the Kinney contract of June 17, 1878, was *not known to Loewenthal.* That knowledge was acquired, if before this suit was brought, not until after he had got his deeds in Nov., 1880 (see R. 87).

Burgess and Badger were there representing Jenkins, according to the testimony of Badger.

Ahrens says he had no conversation with Burgess. What he had with Badger, if any, does not appear either way.

Loewenthal says he did not know that either of them represented Jenkins.

In this state of the testimony *and leaving my own testimony out entirely,* let us turn to the paper itself and the surroundings.

According to the defendant's theory *no one* had any title to this property except Kinney and Loewenthal, and they got their title from Walker.

According to complainant's theory, not only the bank and Kinney, but Walker's assignee had an interest from Walker.

This paper is drawn up by Ahrens, Loewenthal's attorney. Now he had in his mind the interest of the parties to be protected by it upon the instructions given to him by Loewenthal. Does he confine its provisions to those who are within the defendant's theory, or does he use such language as includes more than these, and for which language there was no necessity on the defendant's theory, and *for the use of which, neither he nor Loewenthal offer any explanation?*

This agreement is at R. 66. It is dated Feb'y 16, 1880, made between Loewenthal, Rosenberg and Kinney, and begins with a recital of the Bauer suit decree and the sale under it to Rosenberg as trustee for the benefit of the parties in it; the deed to him

under that decree of Sep't 20, 1879, as such trustee. That there is now pending in the Appellate Court for the First District of Illinois a writ of error sued out by said Walker *and now prosecuted by Robert E. Jenkins, his assignee in bankruptcy, to reverse said decree*," and "there is also pending in said Appellate Court an appeal by said Eli Kinney, touching certain matters in connection with said suit" and "it is deemed by *all* the parties to said litigations who are interested in said premises, that the same during said litigation should be docked and put into a condition suitable for lumber yard purposes and leased for the benefit of parties interested therein." Therefore it was agreed that the premises should be improved according to plans agreed upon by Loewenthal and Barker as the attorney in fact of Kinney, and leased not to exceed five years, as agreed upon by Loewenthal and Barker as the attorney in fact of Kinney. The rents are to be applied in payment of advances made by Loewenthal to improve property and remove certain incumbrances prior liens to all parties.

"If he shall be so re-imbursed before the termination of the litigation aforesaid, he shall continue to collect the rent and have control of said premises as aforesaid until said litigation shall be finally disposed of, for the benefit of the parties who may then be under the decision of the Court entitled to said premises and rents, to which parties said Loewenthal hereby agrees to then account therefor, and said Rosenberg agrees to assign said lease or leases to such party, that if said decree should be reversed in whole or in part and said premises should be again sold, then the purchaser shall take the same subject to the lease so to be made by the

said Rosenberg, and out of the proceeds of such sale said Loewenthal shall first be re-imbursed for all advances to be made by him as shall then remain due him, and such advances shall be a first lien ahead of all *mortgages* or trust deeds upon said premises, and neither said Kinney *nor any other person* shall have any relief except subject to the right of said Loewenthal to be fully repaid for all his advances."

If Rosenberg held the legal title and Loewenthal was no longer acting as Receiver, why was he singled out from the four parties interested under Rosenberg, viz. Bauer, Schoelkopf, the bank and himself, to sign this paper.

If no one was litigating as to the title to this property but Kinney, why state that Jenkins was prosecuting a writ of error to reverse the decree, and Kinney also prosecuting an appeal.

Having stated a litigation to which Jenkins was a party, it is then said. "it is deemed *by all the parties to said litigation who were interested in said premises*," instead of "it is deemed by the *parties to this contract.*" *The first includes Jenkins.* The latter would include only the parties on the face of the instrument contracting, and is what these parties to avoid notice, now claim were the only parties they then knew of. In the very next sentence, in sharp contrast, the words, " It is agreed by the parties hereto as follows," are used, conclusively showing that there was in the minds of the contracting parties, others interested in what they were doing, and so is not consistent with the testimony of Loewenthal. But, looking over all the provisions of the contract it is evident on the face of it that it is intended to bind others than the parties to it.

After Loewenthal is re-imbursed he is to hold until the termination of a litigation, to which Jenkins, assignee, is recited as being a party, for the benefit of the parties who may then be under the decision of the Court, entitled to said premises, *to whom Loewenthal agrees to account, and Rosenberg agrees to assign said lease or leases.* But if there were only two parties, one of them Bauer *et al* and the other Kinney, there was nobody but Kinney entitled to the property, and the contract to account and assign would have been limited to Kinney alone, or at least to the contracting parties. And so, if the decree is reversed upon the errors prosecuted by Jenkins, the assignee, then the purchaser shall take subject to the lease. There was no necessity of saying this if no one else but Kinney was interested in that litigation in the premises, for his contract would bind him, and any purchaser anyway. And these advances are to be "ahead of all *mortgages* or trust deeds." Now there is no *mortgage* in the whole case, unless the deeds to Kinney are mortgages—and then it finally wound up by saying "neither said Kinney *nor any other person shall have any relief*, except subject to the right of Loewenthal, to be fully repaid for all his advances." Who was asking for relief on the face of this contract? *Jenkins, the assignee was*, for he is stated to be prosecuting a writ of error to reverse the decree.

All these parties knew Jenkins was prosecuting this litigation. Why these comprehensive provisions were put in the contract, utterly unnecessary so far as Kinney or the quartette were concerned Loewenthal and Ahrens fail to give any explanation.

Now that Badger took a part in getting up this contract is not disputed; that he was the agent of Jenkins, the assignee, is not disputed; that these parties at that time knew him only as such agent, and did not know of the contract he had with Kinney is also clear. Now saying nothing about Burgess or his testimony, which I desire the court to drop out of consideration on this question—take the act of Badger appearing there as the agent of Jenkins, and the comprehensive language of this contract, the rights of Jenkins to this land must have been known to the parties to it.

NOTICE PROVED.

Loewenthal, Bauer, Schoelkopf and the International Bank stand charged with notice that these Kinney deeds were mortgages by the following array of facts proved.

On the 25th April, 1878, the cause of *Bauer* v. *Walker et al.* is heard, and decree entered wherein was in issue the priority of their claims under their six notes, and the Rogers trust deed, and the priority of principal notes held by the bank unsecured over the Kinney deed, and on the hearing the testimony of S. J. Walker was used, taken in December, 1876, called out by these parties, their own witness, in which he testified that the Kinney deed was a mortgage, and otherwise had no consideration whatever.

On the 19th June, 1878, Jenkins, to protect the property and the interest of creditors therein, as developed by the schedules filed in Walker's bankruptcy proceedings, filed a bill in the United States Circuit Court at Chicago against these parties, praying to enjoin in order to protect those interests, the sale of this very property among others; to that bill

they appear and demur to the bill a few days after it is filed, and on their motion it is finally dismissed before this purchase is made, and that after Jenkins "as assignee" had moved to be made a party to it as such.

On the 26th March, 1879, Jenkins appears by his solicitor, and in open court consents to the appointment, on petition filed by the bank, after the Bauer cause was out of the Circuit Court, and in the Appellate Court, to the appointment of a Receiver for this property by the Circuit Court—a proceeding that necessarily brought before the court all parties claiming an interest in it. That order remains in full force to this day Loewenthal now acting as such receiver.

On the 4th April, 1879, Loewenthal proves up, in person, a claim against S. J. Walker in his bankruptcy proceedings, wherein this property is described as mortgaged by Walker to Kinney.

On the 14th January, 1880, Jenkins serves notice on the solicitor of these parties in the pending litigations, *Jenkins* v. *Bauer*, and *Kinney* v. *Bauer*, that he claims an interest in the matters then in litigation between Kinney and them; Kinney then having a suit then pending in the Appellate Court on cross-bill filed in the Bauer case in the Circuit Court, claiming title to this property under that deed, to which Jenkins was not a party.

On the 16th day of February, 1880, in the course of negotiations for leasing this property, started pending this litigation, between Loewenthal and Kinney, Badger, the agent of Jenkins, who then, to the knowledge of these parties, had no interest other than as such agent, appears and intervenes in that negotiation. A contract grows out of those negotia-

tions, in which the litigation being carried on both by Jenkins, as assignee, and by Kinney, is spoken of, and the rights of third persons provided for and made subservient to it—a provision utterly unnecessary unless Badger had appeared then as the agent of Jenkins. His appearance is now sought to be covered over and explained away by his contract with Kinney; but these parties knew nothing of that at that time, nor until long after. The question here being not the fact of, for whom did Badger have authority to act, but, the fact for whom they had notice or knowledge of his having authority to act.

Should the Court believe that Loewenthal did not know personally any of these, are there about this case circumstances sufficient to have put these parties or their attorneys in charge of their business on inquiry as to the nature of Kinney's title? Particularly so, when, as between Kinney and Walker it was never disputed, and, by matter of record in the bankruptcy proceedings and in the Bauer suit, it was fully disclosed.

Are there not facts calling attention to and a turning away from sources of knowledge on the subject plainly within their reach?

Doyle v. *Teas.* 4 Scam. 202. In this case it was sought to charge a principal with notice given to an agent, and in commenting on the subject of notice the Court said, p. 250; "When the Court is satisfied that the subsequent purchaser acted in bad faith, and that he either had actual notice, or might have had that notice, had he not wilfully or negligently shut his eyes against those lights, which, with proper observation, would have led him to knowledge, he must suffer the consequences of his ignorance, and be held to have notice so as to taint his purchase

with fraud in law. It is sufficient if the channels which would have led him to the truth were open before him, and his attention so directed that they would have been seen by a man of ordinary prudence and caution, if he was liable to suffer the consequences of his ignorance. The law will not allow him to shut his eyes when his ignorance is to benefit himself at the expense of another, when he would have had them open and enquiring, had the consequence of his ignorance been detrimental to himself and advantageous to the other."

R. 251. "Were the evidence satisfactory that she (the agent) had heard of that sale before she purchased from a source entitled to any reasonable credit, and under circumstances not likely to be forgotten, I would hold that the duty had devolved upon her of tracing the matter out, and ascertaining its truth to the same extent that she would have done had she been making the purchase for herself, knowing that she must suffer the loss if she purchased the land when Doyle had an equitable interest."

Williams v. *Tatnall*, 29 Ill. 553. At 564 "the law is not disputed, that notice to an agent or an attorney, when received in the course of the business of the agency, or under such circumstances as induce the satisfactory belief that it was received while transacting such business, is as effectual as notice to the principal personally." At 565, "Here there was notice to McComas proved in a legitimate way, *and that was notice to his client, for the law conclusively presumes that he communicated that notice to his client.*"

Harper v. *Ely*, 56 Ill. 194.

In the case at bar formal notice is given to Pence, the attorney of these parties, in writing, signed by

the solicitor of the assignee, that he, the assignee, claims an interest in the matters in litigation between Kinney and his clients.

Is not the source entitled to reasonable credit? It is the party claiming himself through his avowed attorney, giving notice to the avowed attorney of the other side. That notice it was the duty of Pence to communicate at once to his clients, for it was a notice of a *present* interest in the subject-matter of a *present* litigation then under the control and management of this attorney. *Haas* v. *Chicago Building Society*, 80 Ill. 248.

Cox v. *Milner*, 23 Ill. 479, "In all cases where the evidence is satisfactory that a party claiming had heard of the sale of the land before he purchased, and from a source entitled to any reasonable credit, and under circumstances not likely to be forgotten, the Court would hold that the duty devolved upon him of tracing the matter out, and ascertaining its truth. Such knowledge is sufficient to put him upon inquiry, and makes him chargeable with knowledge of such other facts as might be ascertained by the evidence of ordinary diligence and understanding.

The assignees' right to property would ordinarily appear from the schedules filed with the petition in bankruptcy. When Jenkins claimed this interest those schedules did show that fact, and an examination of those records would have disclosed the interest.

Henneberry v. *Morse*, 56 Ill. 396.
Babcock v. *Lisk*, 57 Ill. 329.
Richardson v. *Stevens*, 71 Ill. 646.

And finally Loewenthal, the agent of these parties in these transactions, the receiver appointed by

the court in charge of the property for those who in the end should be held, "under the decision of the court, to be entitled to these premises."

Having thus established the fact that the deeds from Walker to Kinney were in fact mere mortgages; that the notes secured by them were retained and not transferred to the defendants; that they had notice of these facts. We now come to

The defense of the Statute of Limitations.

This is, in the answers filed, sought under § 5057 of the Revised Statutes of the United States, part of the Bankrupt Act, and reads as follows:

"No suit, either at law or in equity, shall be maintainable in any Court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

The bill in this case was filed the 27th May, 1881, and consequently the bar of this statute in favor of defendants in error must begin to run between the 31st day of July, 1878, the date of the assignee's deed, and the 27th day of May, 1879—two years before filing the bill to bar him.

It is then material to inquire *who, on the 31st day of July, A. D. 1878, was in possession of these premises, and under what claim of title.*

Kinney (R. 57), on the 1st February, 1877, made a lease of Lots 31, 32, 33 and 34, to Hupe & Kertenstein, and they were in possession under this lease of those lots when the assignee was appointed.

Winters (R. 57), made no lease.

Hair's arrangements, whatever they were, were some time in the fall of 1879 (R. 77); but he did not take any possession.

March 26, 1879, Loewenthal was appointed receiver, *by consent of all parties* (R. 14), which involved an injunction restraining any of them from taking possession. That possession he claims to have surrendered Sept. 25, 1879, to Rosenberg, but that was too late for the purposes of the bar under this statute in their favor.

As to the rest of the property—that is, Lots 21 to 30, 36 and S. ½ of 37—there is no proof in the record that any one was in possession prior to the 21st May, 1879. Then as to them there is no bar at all —*because possession in fact by the mortgagee is absolutely necessary to set the statute running in his favor against the assignee.*

As to the Lots 31, 32, 33 and 34, and if I am not right in the views in reference to them, then as to all the land—was the statute ever set running at all in favor of defendants?

Kinney's possession of the land, after the notes fell due, was consistent with his title, both legal and equitable, as between him and Walker, or Walker's assignee. They neither of them could object to it.

2 Jones, 1152: "so long as the relation of mortgagor and mortgagee exists, the statute does not commence to run in favor of either the mortgagor or the mortgagee. That relation must be terminated in some way before either party *in possession* can interpose the statute as a defense against the other."

2 Jones, 1156: "As against the owner of the equity of redemption, the statute does not begin

to run until the mortgagee takes *actual and open* possession of the mortgaged premises; and it does not begin then if he holds under his mortgage title and recognizes the mortgagor's right of redemption."

Miner v. *Beekman*, 50 N. Y., 337–343.
Hubbell v. *Sibley*, 50 N. Y., 468.
Knowlton v. *Walker*, 13 Wis., 264.
Waldo v. *Rice*, 14 Wis., 286.

Robinson v. *Fife*, 3 Ohio State Rep., 561: "It is not the possession, merely, but the nature of that possession, which operates in equity as a bar to the redemption by the mortgagor, or those claiming title under him. So long as the mortgagees admit that they hold as mortgagees, or by their acts show that they hold as such, and not by any other right, time does not begin to run against the right to redeem. Any deliberate act done, *or acknowledgment* by the mortgagor or mortgagee, while in possession of the premises, evincing the existence of the mortgage, will save the rights of the mortgagee on the one hand to foreclose, and of the mortgagor on the other to redeem.

It is said in *Knowlton* v. *Walker*, 13 Wis., 264, at p. 273: An equity of redemption is an estate in the land itself, which may be devised, granted and charged with the payment of other debts of the mortgagor or owner. It is a part of the law of the land, and as such can not, in case of a mortgage, in any way be provided by agreement that a court of equity shall not give relief. Whenever, therefore, it is ascertained that a transaction is a mortgage, this equity at once arises, and courts can not distinguish between one mortgage and another. The estate, if it be an equity of redemption, must in all

cases be the same, and must be governed by the same rules which regulate other similar interests. It matters not what peculiar form the instrument evidencing the transaction may have taken, the substance of the inquiry always is, was it a security for a loan of money or other property? And this being answered in the affirmative, it is difficult to perceive why, in a court of equity, one borrower should stand upon a different footing from another, or why the estate of one owner of an equity of redemption should be less durable and complete than that of another. The only practical difference between an equity under a pure mortgage and one under an *impure* one, or an instrument not technically a mortgage, is that the latter is often much more difficult to be established. But should it for that reason be less an estate? Should the mortgagee be rewarded for an attempt to disguise the real nature of the transaction? We think not. We can discover no good reason for discriminating between the two. In the many cases to be found in the books where deeds and other instruments absolute upon their face have been declared to be mortgages, and a right of redemption decreed, we do not remember any in which the distinction has been made. In the absence of fraud, or other improper conduct, on the part of the applicant, the only limit which has been prescribed to the exercise of the right to redeem is that fixed by the statutes or by courts of equity in analogy to them. * * * There is no doubt in our minds that in such case the statutory period dates only from the time the mortgagee *takes actual, open and notorious possession of the premises*. This is too well settled to admit of discussion. If after he has done so, the mortgagor permits him thus to continue in

possession for the period prescribed without proceeding to redeem or requiring an account of the rents, issues and profits, the bar is complete, but not till then." In this case a deed absolute on its face was held to be a mortgage.

2 Jones, Mort., § 1158. Nothing short of actual possession by the mortgagee, continued for the time required by statute, without accounting or *admitting that he is merely a mortgagee*, but under a claim of absolute ownership, will avail to convert his mortgage title into a title absolute in equity. Citing *Miner* v. *Beekman*, 50 N. Y. 337; *Demorest* v. *Wynkoop*, 3 John. (N. Y.) Chy. 129.

Ib. § 1159. "This rule is equally applicable to the case of an absolute deed given to secure a debt, and treated by the law as a mortgage. *Green* v. *Turner*, 38 Iowa, 112. The statute does not begin to run against the right to redeem such a mortgage until a tender and refusal of the money secured by it (*Wilson* v. *Richards*, 1 Neb. 342), or at least until the mortgagee denies the right of the mortgagor to redeem, and the mortgagor has actual notice of such denial, or of the mortgagee's adverse holding, as in cases where the mortgagee has entered under an agreement to account for the rents." (*Yarborough* v. *Newell*, 10 Yerger, Tenn. 376; *Hammonds* v. *Hopkins*, 3 Ib. 525.)"

In *Yarborough* v. *Newell*, 10 Yerg. 376, there was an absolute deed from Yarborough to Newell held to be a mortgage, a forfeiture by non-payment when due and possession by the mortgagee taken at time of mortgage. The Court says (p. 381): "It does not appear from the evidence in this case that Yarborough had any knowledge that the defendant denied his right to redeem." It appeared

that A. Niblett, an agent of the complainant, had tendered the amount due, and it had been refused, but there was no proof that this fact was communicated to Yarborough, and so the court says, p. 282, referring to the case of *Duke* v. *Harper*, 6 Yer. 280: "The principle is that to change the relations of the parties in such cases there must be actual personal knowledge that the possessor is holding adversely for himself. Constructive notice will not be sufficient."

After the statute has apparently run the courts are reluctant then to receive verbal acknowledgments calculated to destroy a title that had, when the supposed acknowledgments are supposed to have been made, become absolute. 2 Jones, Mort. § 1171. But that is not the case here, as the acknowledgment to Badger was within two months after Jenkins' appointment, and long before the statute ran against the assignee, and Lowe's testimony shows that E. Kinney & Co. never claimed it to be anything but a mortgage.

Then there must be *possession* and *adverse claim* of title to the *knowledge* of the other, and the lapse of time provided by law. These things do not exist in this case, and there is no bar under this statute, in favor of the defendants.

The defendants set up in this answer a tax deed.

The facts which render it inoperative as paramount title are conceded at R. 96.

The parties holding the tax deed were at liberty to charge the amount paid with interest in the account under the provisions of the trust deed, R. 96.

The petition for the appointment of receiver (R. 99,) sets up no claim under this tax deed. That petition was presented by the bank on the

26 March, 1879, and they then held this pretended tax deed, and were *not* in possession. The application was inconsistent with any claim under it, and the possession of the receiver taken by consent of all parties, (R. 101,) under that order is inconsistent with any claim of title under the tax deed, and that possession is as much the possession of Jenkins as of any other party, as said before, Rosenfeld did not get possession from Loewenthal, the receiver, until Sept., 1879, (if he did then which we deny,) and that was too late for the bar to run.

This is the first possession possible taken under the tax deed, and until possession was taken under it, no cause of action existed in favor of the assignee. He could sue nobody, for the *person claiming title under the tax deed* was not in possession.

The defense introduced several documents filed by Kinney in the Bauer case to show an adverse claim of title by him.

The decree in the Bauer case was rendered April 25, 1878, and the writ of error sued out June 18, 1878. No action of any kind could be taken in that case by Jenkins as assignee until July 31, 1878, and then only in the Appellate Court, consequently all these matters are as to Jenkins *res inter alios acta*, and no claim of anything as to or against him.

Kinney's petition to stay sale (R. 52.) was filed June 22, 1878. Kinney's petition to stay distribution June 29, 1878 (R. 52). His answer to Bauer's bill was filed July 26, 1878 (R. 52). His cross-bill in Bauer's case to which Jenkins was not a party, was filed April 21, 1879, all while Jenkins was in the Appellate Court.

Kinney's bill in United States Circuit Court (R. (54,) was a bill to redeem from the Roger's trust

deed. He could not in that litigate his title with Walker, and Walker could not with him. Their controversy would have been one of which that court in that case would not have taken jurisdiction.

The case was, however, dismissed in July, 1880, (R. 58.) and it is not seen of what avail it is to any one.

The bill filed by Jenkins as *provisional* assignee in the U. S. Court on 19 June, 1878, was a nullity in point of law, any way, and the point was made by the counsel as ground of dismissal. Jenkins, as *provisional* assignee, had no standing in court. He was a stranger. And again it is not seen of what avail that proceeding is to the defense; for if he could not do anything for the estate in bankruptcy he certainly could do nothing to hurt it. Jenkins came in as "assignee" on the 23d May, 1879, and (R. 59) moved for leave to file a supplemental bill in the case. Is not this the most ample notice to these parties that he was claiming title to these lands? This was long before Loewenthal got his deed.

The mortgage from Kinney to Dunham & Kyle (R. 60) was relied on below as an act setting the statute of limitations running—because it contains (R. 60) a covenant of title and of power to convey.

But the defense never have been in possession, and do not claim under this deed, and can not very well do either, as the conveyance under which they claim from Kyle & Dunham (R. 62) expressly *reserves this mortgage from the effect of that deed.* And it is not seen exactly how Kyle & Dunham, who were Kinney's trustees under composition proceedings (R. 62) in bankruptcy could acquire any better title than he

himself had, and this deed does not authorize them to take possession.

Suppose that when this mortgage comes to be foreclosed, the assignee in bankruptcy sees fit in order to protect the property to pay it off, what have these gentlemen to say, and they get title by setting the statute running under an incumbrance, which, if it is a charge on the property, we have a right to pay off and render a nullity.

Now this deed, not accompanied by any possession under it, was the only matter the State Circuit Court found to set the statute running.

The offer to do equity.

This is an objection to be raised on demurrer, if it is available at all, or for any purpose.

No tender is required of the amount due on a mortgage before filing a bill for that purpose. *Barnard* v. *Cushman*, 35 Ill. 451; *Dwen* v. *Blake*, 44 Ill. 135, and in this case this bill was dismissed because that was not done (R. 24) It is true the court might have required the assignee to pay what these parties paid to relieve this land from the incumbrance, $20,000 and interest, but that would have been justified by no precedent.

It is in the power of a Court of Chancery always to impose such terms as the law authorizes it to grant relief upon, whether the complainant offers to do equity or not. Upon the whole case, was this land subject to the incumbrance of these notes, and if it was, who held them, or were they barred, were the pertinent questions for the Court below, and, as answered, relief should have been granted.

To hold otherwise would require a mortgagor who claims that he has paid his debt in full, and is entitled to have his land clear, or that it is barred

by the statute of limitations, to offer to pay what he says he does not owe.

Just why the complainant should offer to pay the defendants the amount due on notes which they concede they never bought, and do not by their pleading claim any title to, is, I confess, beyond my comprehension.

Campbell v. *Benjamin*, 69 Ill. 252. It is "erroneous for the Court to declare the payment of money to Glover when he asked no decree, and desired none."

The defense obtain this land for one tenth of its value, and their position is thus stated in Peugh and Davis, 96 U. S. 332, 337. "A subsequent release of this equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will however be closely scrutinized so as to prevent any oppression of the debtor. * * The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing for similar property in this vicinity. Any marked under-valuation of the property in the price paid will vitiate the proceeding."

This case was where a deed was held to be a mortgage, and the Court says: "It is admitted that the deed of the complainant was executed as security for the loan obtained by him of the defendant. It is, therefore, to be treated as a mortgage, as much so as if it contained a condition that the estate should revert to the grantor upon payment of the loan."

ESTOPPEL.

The defense may have something to say about estoppel growing out of the contract for leasing.

As the assignee has not at any time sought to avoid the binding force of that lease, it is not seen how there can be any necessity for referring to it by way of estoppel.

But estoppels extend no farther than they are mutual. This contract simply provided how the party should be paid for certain improvements, and that is out of the rents of the premises. Now we take the benefit of the improvements and must submit to their being paid out of the rents or pay them ourselves, and, doing either, no harm is done to any one. But when the court goes beyond that and holds that this estops us to say we own the fee, it injures us by enabling them to claim a matter not necessary to protect them in the matter then in the contemplation of the parties. Had that matter and the acts to be done in pursuance of it, also included a sale of the fee then we should have been bound by any act done in *good faith*.

In conclusion we have shown:

1. *The deeds to be mortgages to secure a debt evidenced by notes.*
2. *The debt thus secured barred as to assignee.*
3. *The pleadings concede and it is proved that Loewenthal did not purchase the notes.*
4. *The pleadings concede Loewenthal to be "a receiver" in the cause, and so could not purchase.*
5. *The pleadings are not sufficient to base the defense of a bona fide purchase on.*
6. *The proofs show notice of the assignee's equities and of the character of the deeds to Kinney.*

7. *The two years' bar does not run in favor of the defendants, but does run in favor of the assignee.*

And on this state of law and fact the assignee was entitled to a decree for the relief prayed in this bill, R. 34, that the defendants be decreed to hold said lands and premises subject to the order of the court in the (Bauer) cause and proceeding, for redemption from the trust deed to Rogers.

Relief in this cause was connected with the relief prayed in the Bauer bill necessarily. When the bill in this cause was filed the Bauer bill and the decree on it were pending in the Appellate Court, Rosenberg had obtained a master's deed, R. 65, to himself, untruly setting forth a purchase by himself for his own use. And Loewenthal had obtained a deed from Kinney in fraud of the rights of Jenkins, consequently, a conveyance by them to a third person would give a good title. The apparent legal title thus of record, Jenkins could notify people at large not to purchase only by commencing suit. But necessarily it was subject to the decision of the Appellate Court in the Bauer case then pending, and could only be reached by an original bill in the nature of a supplemental bill awaiting the result of that case. When that case was decided on error then, if no change in the status of the property and the parties had occurred in the meantime, this case could be dismissed and the matter in litigation heard upon supplemental bill filed in that case. R. 47. With that object in view, the Bauer decree being reversed, and no change in the status of the parties having taken place, before the cases came on for hearing I moved, R. 104, to dismiss the bill in this case without prejudice at complainant's costs, but the defendants interposed the objection of their

pending cross bill, and under the State Statute the case went to trial and effectually prevented it. The only decree the assignee can obtain in this case is that he holds the equity of redemption subject to the pending suit of *Bauer* v. *Jenkins*, and that is a right which he claims as assignee in bankruptcy.

One advantage gained by the defense by the course adopted was that in the trial of the Bauer case the deposition of Samuel J. Walker being part of the record. its effect as notice is beyond question; in this case the deposition was only admitted as tending to prove notice. I contend, however, that as it was testimony taken in another cause, where substantially the parties and the issue were the same, it is competent testimony in this case, and equally proves notice by the record conclusive on the party charged.

Wade v. *King*, 19 Ill. 308.
Doyle v. *Wiley*, 15 Ill. 576.

Having presented my views on the facts and the law of this case, let us turn to the decision of the Supreme Court of Illinois rendered in it.

It is said, "unless Loewenthal had notice before he purchased from Kinney that the deeds were but mortgages, his purchase can not be defeated. The fact that the title appeared to be in Kinney, would justify any person in buying from him, and such a purchaser would be protected in his purchase unless he had notice before buying that Kinney held merely as a mortgagee."

It is a novel position to take, that a man out of possession of land, and with no title to it of any kind except a dower interest under his wife, for

such is the peculiar law of this State, can convey anything more than that.

The deeds from Kinney to Burgoyne and Burgoyne to Mrs. Kinney, were of record when Loewenthal got her to make a deed "in escrow" to Kuhn.

Now, Mrs. Kinney was not in possession, nor did she claim to be in possession, and a purchaser from her simply got her title just as she held it, and notice was not required.

The court then passes upon the deposition of S. J. Walker in the Bauer case as notice, and it is said that from it, "It does not appear that there was any understanding or agreement that the property was to be, at any time or upon any terms or conditions, re-conveyed to Walker, or that he had any right to redeem. On the other hand, it seems clear from the first part of his evidence, that an absolute conveyance was made, and Kinney & Co. were to be the owners of the property, and that they agreed to allow Walker a liberal price for the property when he should clear the property of the prior encumbrances. The fact that the amount Kinney was to give Walker for the property was not then fixed, does not militate against this view.

But the very incumbrance that Walker was to remove, was the incumbrance then in suit by them and which, of course, Walker had not removed, and Walker's interest, and so of his assignee, had not ceased, and the defendants knew it. It is of no consequence just what Walker's rights were so long as he had *some interest*. It put them on inquiry as to what it *really was*. Here was a conveyance of land *not absolute*, its consideration solely to pay a debt, the price not arranged nor the conditions complied with, and Walker in bankruptcy. Now, no one but

the assignee could fix that price or see that the terms were complied with. It is not necessary that a notice should give all the details accurately of the rights of the parties, for if it was, the expression "sufficient to put the party on inquiry," could never be used of any notice.

So that I claim on the face of this statement, the Supreme Court concedes notice of the most ample character.

And whether what they state constituted the transaction such as stated by them, I simply refer to *Sutphen* v. *Cushman*, 35 Ill. 186–197, where it is said:

"It is sufficient for us to know that when he took the conveyance on account of a pre-existing indebtedness without in any manner canceling or discharging it, that equity will regard the deed as a mortgage whether he so regard it or not."

As to the proof of debt in the bankruptcy proceedings, this opinion says: "But it is said that in the proceedings in bankruptcy the lots in question were scheduled as a part of Walker's assets, and as Loewenthal proved his debt in the bankrupt court he is chargeable with notice of all that appears in the proceedings. There might be force in the argument *if Loewenthal was claiming title under the bankrupt proceedings;* but he does not claim under these proceedings; and the mere fact that he proved a claim against Walker's estate could not make him chargeable with notice of these proceedings. *Loewenthal was as much a stranger to the schedule of assets belonging to Walker's estate as he would have been had he never proved any claim against the bankrupt.*"

It is said, "*if Loewenthal was claiming title under*

the bankrupt proceedings." I assert that he IS CLAIMING TITLE under those very proceedings to this property. Not *here* and in this suit or proceeding, but *there* and in that suit, and in that court. How? By interposing a claim to the whole or his just *pro rata* with other debts, proved of what the assignee shall, out of Walker's assets, realize for him and others who prove their claims in the bankrupt court, and to say that "he does not claim under those proceedings," is simply *denying consequences provided for by absolute law upon conceded facts.*

"The mere fact that he proved a claim against Walker's estate could not make him chargeable with notice of *these proceedings.*"

What proceedings the court alludes to here I do not understand, unless it be the "bankruptcy proceedings"; that is, the fact that Walker had filed his petition and schedules in the bankrupt court; now he could not prove a debt in those proceedings and not know of them—know that there were such proceedings—and there claiming rights in a pending suit, becoming an actor therein, acquiring interests thereby. Does it lie in his mouth to say that I did not examine the proceedings in the suit and know what it was about?

"Loewenthal was as much a stranger to the schedule of assets belonging to Walker's estate as he would have been had he never proved any claim against the bankrupt."

Suppose that Jenkins, the assignee, had before the 1st Nov., 1880, sold this property, and realized a sum of money from such sale; would not Loewenthal under the laws of the United States have been entitled to his pro rata share of it on that day, if not paid over before—and that without doing a single act beyond

what he had done? In judgment of law he was then and there entitled to his pro rata.

If Loewenthal acquired no rights as to this property by proving his claim in the bankrupt court as against the assignee and the creditors of S. J. Walker, then, he would be "a stranger"; because his relations to the property remain unchanged. But, if by the act done by him, he acquires *relations* to the property, that is, *rights in it*, then he is no longer a "stranger."

That is by legal proceedings duly conducted to a final judgment.

Schroeder v. *Mer. & Mech. Ins. Co.* 104 Ill. 71, 75.

"The court acquires jurisdiction of the plaintiff where he applies for its power and assistance to compel the defendant to render him his rights under the law; but this aid must be sought according to prescribed forms, and under our practice that form requires that he file with the clerk of the court a *præcipe* for the process he desires. This is an application, in its nature, to the court to send its process to require the defendant to appear at a subsequent term to defend the action."

So the bankrupt law has its forms and modes of proceedings, and Loewenthal when he made and filed his proof complied with them and required the assignee to defend against the proceedings thus instituted by him. The case cited proceeds:

"*The court clearly has jurisdiction of the plaintiff when he thus invokes its aid.* When he thus submits his person to the court, he, by asking its aid, gives the court jurisdiction over the subject matter in controversy and confers power to adjudicate and

determine his rights thus submitted. In this manner the court becomes possessed of jurisdiction of the person of the plaintiff and of the subject-matter, and when it so possessed it becomes the duty of the court to commence and carry on the power to bring the defendant into the court that the case may be heard; and the rights of the parties in the matter thus brought before the court may be judicially and conclusively determined. It therefore follows that when the plaintiff submits himself and the subject-matter to the jurisdiction of the court and the court or law commences acting under his claim for its investigation, he has commenced his suit. When he puts the court or its instruments in motion under his claim, his action is commenced. All done in the case subsequently is but a continuation of the action he thus started until the final end of the action or suit."

So here Loewenthal submits his proof of debt in the bankruptcy proceedings. It then became the duty of the court to hear and adjudicate in and according to the mode provided by law. The claim is then allowed; the defendant in that proceeding, the assignee in bankruptcy, is notified in the mode provided by law; and Loewenthal's right *to this very identical property*, has passed into judgment.

Now, these are rights claimed under the United States Bankrupt Act,—that is, Jenkins, the assignee, claims that the result flowing from proceedings instituted by Loewenthal in a court of the United States, under the laws thereof, resulting in a judgment in that court binding him as assignee in favor of Loewenthal, gave him, the assignee, also certain rights against Loewenthal; that he, Loewenthal,

thereby knew that this property was part of the assets of Walker, and those rights so claimed are denied by the State courts.

There is one statement at the close of this opinion that could have been written only by a person not familiar with the facts proved in this record. It is: "Here, at the time Jenkins was appointed assignee, he found on record two deeds conveying the property in fee to Kinney, and whenever the question of title arose he found him asserting title and Walker admitting it."

So far from that being the case, Jenkins found Walker's schedules in bankruptcy, stating under oath, that Kinney held the title as security. His deposition in the Bauer case in which suit he, as assignee, immediately intervened, stating the same thing.

He found his, Walker's, *lawyers* had not told the truth about his title.

He, Jenkins, was advised by Kinney, through Badger, that he, Kinney, held as a mortgage; and the firm of E. Kinney & Co. is shown by Lowe, one of its members, never to have claimed anything else.

Kinney had made a mortgage with a warranty to Kyle & Dunham, trustees, but that none of these parties can claim under, for it is expressly reserved from their conveyances—in the conveyance by them to Kinney—and the most that amounts to is to compel the assignee to pay what, if anything, is due under it.

The statements that the court alludes to are none of them made by either Kinney or Walker in person, but by their attorneys in legal proceedings, and though good as pleadings in the particular cause, and bind the parties for whom they are made in the cause, are worthless for any purpose elsewhere.

The case of *Bailey* v. *Glover*, 21 Wall. 342, cited, fails to support the position taken by the Supreme Court of Illinois, in its opinion. It is there said, "If it is intended to argue that until some one asserts in words that he claims a right to property transferred to the assignee by virtue of the act, which is adverse to the bankrupt, the statute does not begin to run, *though such person is in possession of the property acting as owner and admitting no other title to it*, we think the construction of the proviso entirely too narrow." Under that case it was not the *claim* of adverse interest, but the *possession with the claim* that sets the statute running.

I submit that this opinion is largely the result of misconception, both of the law and the facts of the case.

Respectfully submitted.

W. T. BURGESS,

Counsel for Plff. in Error.

ADDENDUM.

1. It is to be noted that a debt of $20,000 would not ordinarily be proved up against an estate in bankruptcy without an examination as to whether there were assets. Jenkins had the right to act upon this usual mode of doing business, and when, on the 9th of April, 1879, he received the proof made by Loewenthal to conclude that he had examined the schedules, knew their contents, and it was of course unnecessary for the assignee to give him notice of the claim Walker made to this land, so that the effect of proving the claim was to throw the assignee off his guard should it be held that notwithstanding such proof of debt the assignee was bound to give Loewenthal notice.

2. The debt in favor of Kinney & Co. being barred by the act, the conveyances recorded in Nov., 1880, after the bar took effect, were clouds upon the title of the assignee, who could not attack them until he knew of their existence; that was not until they were recorded, and then he came in apt time with this bill in May, 1881.

3. It is not intended to dispute the doctrine of the case of Jenkins, ass'nee, v. Bank, 106 U. S. Rep., by the positions taken in this case. The debt is barred by the lapse of two years from the date of the assignee's deed, July 31, 1880. The bar was then complete. The land was not then, July 31, 1880, in the possession of Kinney, and if we concede that, so far as he and Jenkins were concerned, the possession the receiver had was the possession of the one as much as of the other, yet the legal estate needed no suit to protect it, while

the lien upon it did. If the debt was allowed to be barred because no action was brought to enforce it, then it was as effectually extinguished as if it were paid, and the assignee had a right to insist on that fact after the two years just as much in this case as in any other case when the debt is extinguised and file a bill to have it so declared, if attempts are made to enforce it as an existing claim. Had he allowed two years to go by after he was advised of the series of deeds put on record in Nov., 1880, and had possession followed them, then he would have been barred. But no possession has yet followed them, for Lowenthal is yet receiver for the parties who under the final decree in the Bauer case shall be found to be entitled to them.

The assignee as such can only get the benefit of the two years by *waiting* two years, otherwise he can get no benefit from the act, for if he sues before that lapse of time he meets an existing debt.

The creditor may not be willing to take the property, though in possession of it, for the debt or any part of it, and so keeps the debt alive, just as E. Kinney & Co. did in this case, if we concede they were in possession. If they keep it too long in that condition the debt is barred by the act and their lien is gone.

110-222

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1883.

ROBERT E. JENKINS, ASSIGNEE IN BANKRUPTCY, &C.,

vs.

BERTHOLD LOEWENTHAL ET AL.

Error to the Supreme Court of Illinois.

Brief and Argument for Defendants in Error.

A. M. PENCE,

COUNSEL FOR DEFENDANTS IN ERROR.

Beach, Barnard & Co., Legal Printers, 104 Randolph St., Chicago.

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STATEMENT OF CASE.

This is a writ of error to the Supreme court of Illinois.

There are three distinct propositions or questions in this record, each of which was a sufficient basis for the disposition of the case in the Supreme court of Illinois.

Only one of these questions is what is known as a federal question under section 709 of the United States Revised Statutes.

There are two other distinct propositions decided by that court not federal in character, each of which is a sufficient basis for the judgment of that court. This the court will at once recognize by reading the opinion of

that court in this record (Abst., 106), also found reported in 105 Ill., 157. If this statement be correct, then it will be unimportant whether the federal question involved was correctly decided.

Issues Involved.

For the purpose of demonstrating to the court what the issues were in the Supreme court of Illinois, we will state the pleadings and judgment in the case.

Robert E. Jenkins, assignee in bankruptcy of Samuel J. Walker, filed his bill in the Circuit court of Cook county, Illinois, on *May 27, 1881*, alleging the adjudication of S. J. Walker as a bankrupt on petition filed April 26, 1876, his appointment as assignee, and the deed to him as such assignee, on July 31, 1878, of all the assets, property and effects of said bankrupt.

That lots 21 to 37 inclusive, in block 10, Walker's dock addition, the premises in question, were scheduled by Walker the bankrupt, in which schedule it is stated that the title to said property was held by E. Kinney to secure any indebtedness due E. Kinney & Co., the amount of which was unsettled, and subject to a trust deed securing, with other property, $150,000, held by the International Bank and others as security.

That on January 9, 1873, S. J. Walker and wife conveyed by full covenant warranty deed to said Eli Kinney said lots 21 to 34 inclusive, in fee for the pretended consideration of $155,100, recited in said deed, and on January 9, 1874, being seized in fee, conveyed said lots 35, 36 and 37 by full covenant warranty deed to said Kinney. The pretended consideration recited therein being $31,230.

That said deeds, though absolute in form, were, in fact, to secure an indebtedness of $110,000, evidenced by Walker's notes, then due by him to Kinney & Co., of Cincinnati, and was, in fact, only a mortgage.

That at time of filing said petition to be adjudicated a bankrupt, S. J. Walker was in the actual possession of said premises.

That Kinney, both before and after Walker was adjudicated a bankrupt, admitted that said deeds to him were only intended as security for the payment of said notes, and that complainant, not knowing that Kinney ever did set up any other state of title, relied upon such statements of Kinney, and the schedules in bankruptcy of Walker stating the same thing, and was governed thereby in his acts until after the expiration of two years from the date of the deed to him, as such assignee, after which time, and on March 26, 1880, he, in fact, for the first time, learned that Kinney had conveyed said premises, and that the same had become vested in Kinney's wife, and that on November 6, 1880, said Kinney and wife, for some nominal consideration, had conveyed said premises, through one Kuhn, to appellee, Berthold Loewenthal. That all of said deeds were without any good or valuable consideration in fact, and with notice to Loewenthal of the rights and equities of Walker and complainant, his assignee, in said premises, and in fraud of plaintiff's rights.

That the notes held by Kinney, so secured upon said premises, never passed out of his hands into the hands of said Loewenthal.

Complainant then sets up the securities held by Loewenthal, Bauer, Schoelkopf and the International Bank, secured by a prior trust deed to Rogers, and executed by

said Walker, dated December 29, 1871, and recorded January, 1872, upon the same premises; alleges that said Bauer filed a bill on August 29, 1874, to foreclose same, making Walker the mortgagor, Kinney the party in whom the title stood of record, and others parties defendants, and on April 25, 1878, a decree of foreclosure was entered, ordering the sale of said premises, and that the master sold the same on June 24, 1878, to Jacob Rosenberg, the vice-president of the International Bank, for the use of Bauer, Loewenthal, Schoelkopf and the International Bank.

That a writ of error was afterwards sued out and prosecuted by Jenkins, assignee, etc., in the Appellate court of Illinois. Pending same Loewenthal was appointed receiver to take charge of the premises in question and preserve the same. Pending said writ of error, and on February 16, 1880, an agreement was entered into between Loewenthal, Kinney & Rosenberg, trustee for the parties for whom he had bought at said master's sale, for docking and leasing said premises, subject to the decision of the Appellate court, and said premises were thereunder docked and leased to parties who are now in possession.

That on September 27, 1879, the time of redemption having expired, the master executed and delivered a deed for said premises to said Rosenberg for the use of Loewenthal, Bauer, Schoelkopf and the International Bank.

That certain propositions for settlement, pending said writ of error, were set on foot by Loewenthal, the president of the bank, with Kinney, and such fact coming to the knowledge of complainant, he caused a notice to be given to the counsel for said Loewenthal dated January, 1880.

That notwithstanding said notice, Loewenthal, on his own behalf, and on behalf of Bauer, Schoelkopf and the bank, went to Cincinnati, and on November 23, 1880, procured a release of errors from Kinney in said suit so pending in error in said Appellate court, and also a pretended deed of conveyance from Kinney and wife, before set out, of the premises in question.

That Loewenthal then had notice, and knew that Kinney did not own said premises, but held the same as security, and that Kinney did not assign the notes to him, but has since assigned the same to A. C. Badger.

That Loewenthal, April 3, 1879, proved a claim in bankruptcy against the estate of Walker, and that thereby he was charged with notice of the claim of Walker and his interest in said lands.

That Loewenthal should be compelled to release and convey said premises to complainant Jenkins as such assignee. (Abst., 1–12.)

Prayer that the title so acquired by Loewenthal of Kinney be declared and adjudged either a nullity, or to be held in trust for assignee, and for a conveyance of same to him, and for general relief. (Abst., 1–12.)

By way of supplement, complainant alleges that the decree so entered in sald Bauer foreclosure suit had been reversed by said Appellate court.

Answer of Loewenthal *et al.* (See Abst., 13–17, 19, 20.)

Admits the bankruptcy of S. J. Walker, and that complainant was elected his assignee, as alleged in bill. The answer does not raise any question that such assignee has acquired all the rights of Walker, if anything, in said premises.

The answer alleges the purchase of Walker by Kinney on January 9, 1873, and conveyance by full covenant warranty deed to Kinney of lots 21 to 34, inclusive, which was recorded on January 21, 1873, and also the purchase of Walker by Kinney on January 9, 1874, and conveyance by full covenant warranty deed to Kinney of lots 35, 36 and 37, which was recorded February 19, 1874, as alleged in bill, and that said purchase was for a full and valuable consideration then and there paid.

They deny that said conveyance was as a security for payments of indebtedness as alleged in bill, but that the same were absolute purchasers, and said deeds absolute deeds.

That long prior to Walker's petition to be adjudicated a bankrupt, he knew that Kinney claimed to be the absolute owner of such premises, adversely to Walker. And that complainant knew at the time of his appointment as assignee, and ever since that Kinney claimed said premises adversely to Walker and to said assignee, under and by virtue of the deeds to him aforesaid.

That said pretended cause of action in favor of assignee accrued to him at time of the deed to him as such, and more than two years prior to the commencement of this suit, and the said assignee had knowledge of said pretended cause of action more than two years prior to commencement of this suit.

That more than two years prior to commencement of this suit said assignee knew that Kinney claimed said premises adversely to him under said deeds.

That more than two years prior to commencement of this suit such assignee was put upon inquiry as to the estate and title of Kinney in said premises, and, by reasonable

diligence, he could, more than two years prior to commencement of said suit, have ascertained the claim of said Kinney; and that said assignee, at the time of his appointment as such, had actual knowledge of such pretended cause of action.

That said pretended cause or causes of action in said bill mentioned did not, nor did either of them, accrue to complainant at any time within two years next before commencement of said suit; and they rely upon the statute of the United States in that behalf provided, in like manner as if they should have specially pleaded the same in bar of said bill and of said pretended cause or causes of action.

Also admit the other deeds as set out in said bill, and the deed to said Loewenthal; but deny that they, or either of them, were without consideration; and allege that said assignee had actual knowledge of all of them when made; and allege that the deed from Kinney to Burgoyne, and from Burgoyne to Mrs. Kinney, were for a valuable consideration, and that Mrs. Kinney took said deed and paid a full and valuable consideration therefor, without any knowledge or notice on her part of the pretended claim of said assignee, and she believed that Kinney was the owner thereof, and had the right to convey same to Burgoyne, and that Burgoyne had a right to convey same to her, and that Mrs. Kinney was paid $20,000 by said Loewenthal at the time of the conveyance to him, which was all said premises were worth.

Admit the trust deed to Rogers dated December 31, 1871, and that notes were secured thereby as alleged and set out in the bill of foreclosure filed by Bauer, as alleged in bill, and that a final decree was rendered in said foreclosure suit on April 25, 1878, and that a writ of error

was sued out of the Appellate court as alleged. That Loewenthal was under said foreclosure proceedings appointed receiver of said premises, but only until the time when the master made the sale to Rosenberg, the purchaser under said foreclosure.

Admit the contract for docking and leasing said premises made February 16, 1880, between Loewenthal, Kinney and Rosenberg, who then held the master's deed for the use of Loewenthal, Bauer, Schoelkopf and the bank, but deny that Loewenthal made said contract as receiver but as owner of part of the beneficial interest under said master's decree to Rosenberg. Deny that Loewenthal exercised any control over said premises as receiver from time of said master's deed dated September 27, 1879.

Deny all knowledge of the letter by Burgess to Rosenthal & Pence, dated January 14, 1880, and deny that it is notice of anything to them.

Admit the deed of Kinney and wife to Kuhn, and of Kuhn to Loewenthal was for the benefit of himself, said Bauer, Schoelkopf and the bank, and allege that he paid $20,000 therefor, and admit that Kinney obtanied a release of all claims in said Bauer foreclosure suit.

Admit that neither Kuhn nor themselves ever held said notes of Kinney referred to in bill—and deny that Kinney had only a security for such notes, or that he did not have any other title than a mortgage.

Deny that they knew that Kinney held said premises as security simply, and not absolutely, as the same appears by record, and deny that they had notice, which should have put them on inquiry.

Deny that Badger holds said Kinney notes, or that he paid anything therefor.

Deny that the proof of a claim by Loewenthal against the estate in bankruptcy of Walker, was any notice to them of assignee's claim. (This was not the same indebtedness secured on these premises and foreclosed in the Bauer case.) (Abst., 13–18.)

Admit the reversal of the decree in said Bauer foreclosure suit by the Appellate court.

Upon the hearing in the Circuit court of Cook county, the bill of the assignee, plaintiff in error here, was dismissed for want of equity.

The case was appealed to the Supreme court of the state, by the assignee, and the following errors were assigned by him in that court:

1. That the Circuit court admitted improper evidence.

2. That the Circuit court dismissed the bill of complaint, whereas it should have rendered a decree for complainant therein, as prayed for.

3. That it refused to consolidate with, and hear this case, in the Bauer case. (Abst., 105.)

The Supreme court of the state affirmed the judgment of the Circuit court of Cook county in this cause, and rendered its opinion which will be found (Abst., 106); also see opinion in 105 Ill., 157.

It is apparent from the pleadings and judgment that the following issues were submitted to and decided by the Supreme court of Illinois in favor of defendants in error:

First. That the conveyances by Samuel J. Walker and wife to Eli Kinney of lots 21 to 37, inclusive, in block

10, Walker dock addition, *were absolute in fact as they were in form*, and were not made as security, and that Loewenthal, Bauer, Schoelkopf and the bank claiming under Kinney take the absolute title so possessed by Kinney.

Second. That Loewenthal, Bauer, Schoelkopf and the bank, purchased the title of Kinney for a valuable consideration paid, *without notice or knowledge* that Kinney's title from Walker was held by Kinney as a mortgage.

Third. That the suit of Jenkins assignee of plaintiff in error, was barred under § 5057, Rev. Stat. U. S.

The foregoing issues were distinctly raised and decided.

The first and second do not involve any federal question. Either is a sufficient basis or reason for the decision of the Supreme court of the state; and if it were conceded that the third, being a federal question, was erroneously decided, yet the case would not be reversed for that reason if the other issues were a sufficient basis for the judgment of the Supreme court of Illinois; and it matters not, under such circumstances, whether this court be of the opinion that the other issues were improperly decided. Having been decided by the Supreme court of the state, and they involving only the general principles of jurisprudence, not depending upon any federal statute, this court will not review the same, nor will it reverse the judgment, because the issue involving the federal statute was erroneously decided.

Murdock v. *City of Memphis*, 20 Wall., 590.

The fact that this suit was brought by an assignee in bankruptcy, who claims his title by virtue of his appoint-

ment under a United States Statute, does not raise a federal question. No issue was taken as to the validity of his appointment, or that he took whatever title his bankrupt possessed.

Scott, Assignee, v. *Kelley*, 22 Wall., 57.

In that case this court said: "The question presented "for the decision of the state court was not whether if "the bankrupt had title, it would pass to his assignee by "the operation of the bankrupt act, but whether he had "title at all. The court decided that he had not. Such "a decision by a state court does not present a question "of which this court can take jurisdiction upon a writ of "error."

It might be claimed even that the third issue decided, that of the limitation provided by the federal statute, did not raise a federal question, inasmuch as the claim under that statute was *allowed*, and inasmuch as plaintiff in error did not claim anything under a federal statute. But as this court entertained jurisdiction of the same question in *Jenkins* v. *The International Bank*, 106 U. S., 571, we will not urge the question further.

Counsel however contends that upon the issue of *notice* to the purchaser, that Kinney held his title from Walker as mortgagee, and not as absolute owner, he raised the question that Loewenthal had *notice* by reason of his proof in bankruptcy of a certain other claim *in the matter of the estate of Walker the bankrupt*, and by reason of the fact that in one of Walker's schedules in bankruptcy, he stated that the conveyance by him to Kinney was intended simply as a mortgage, whereby, counsel contends, a federal question was raised. He contends that the schedule was constructive notice to Loewenthal that Kinney held his title as mortgagee, and hence the decision of

the Supreme court of this state that such fact or facts did not constitute notice to Loewenthal, was denying to him a right or title which he claims resulted to him under a federal statute.

It is a little difficult to see how plaintiff in error claims, by virtue of the foregoing, any right or title under a federal statute. Does not such question of notice depend entirely upon the general principles of jurisprudence? Suppose such schedule could constitute notice, does that in any manner depend upon any federal statute, simply because it is found in a proceeding which was instituted by virtue of a federal statute. As well claim that any pleading, deposition, or other paper found in any suit instituted in the United States courts, when decided not to be notice in some other suit, involved a federal question simply because such proceeding was instituted under or by virtue of a federal statute.

The statute of the United States does not declare that such a schedule shall be notice of its contents to any one; whether it is notice or not does not depend upon any federal statute, but upon general principles.

It is clear that such question of notice or no notice is one entirely governed by general principles, and does not depend upon a statute of the United States.

But counsel does not make any progress, for still another question remains, which was raised and decided against him in the state Supreme court, viz : That the conveyance by Walker to Kinney was an absolute deed, and not a mortgage. He cannot by any possibility eject a federal question into that issue. And there being a single issue or question sufficient for the disposition of the case, in which is not involved a federal question, this court will

refuse to consider the case, but will dismiss the writ of error.

As to the merits of the controversy, we deem it unnecesary to discuss the same, but out of an abundance of caution, we file herewith our argument in the Supreme court of Illinois, which is bound up with these remarks.

We might however refer to the fact that the decision of the Supreme court of Illinois upon this federal statute of limitation is undoubtedly correct, and will be governed without further controversy by the case of *Jenkins* v. *The International Bank*, 106 U. S., 571.

We also upon this question refer to point VI. of our brief referred to before, in the Supreme court of Illinois.

Respectfully submitted.

JULIUS ROSENTHAL,
A. M. PENCE,
Counsel for Defts. in Error.

110-222

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1883.

1232

ROBERT E. JENKINS,
Assignee, etc.,
vs.
LOEWENTHAL ET AL.

In Error to Supreme Court of Illinois.

REPLY.

W. T. BURGESS,
Of Counsel for Plaintiff in Error.

CHICAGO ILL.
S. I. BRADBURY & SONS, PRINTERS, 78 FIFTH AVENUE.
1884

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1883.

ROBERT E. JENKINS,
Assignee, etc.,
vs.
LOEWENTHAL ET AL.

In Error to Supreme Court of Illinois.

REPLY.

The counsel for the defendants state the ~~then~~ issues in this case to be:

1st. Were the two deeds from the bankrupt, S. J. Walker, to Kinney, mortgages or absolute conveyances?

This issue was not decided either way in the Circuit Court, (R. 27.) "It is claimed by said assignee that said two conveyances, though absolute in form, were intended as mortgage security; *as to which the Court makes no finding.*"

And the Supreme Court of Illinois, after stating the facts of the case in their opinion, say, (R. 110): "If it be conceded that the two deeds made by Walker to Kinney were not intended by the parties to be absolute, but the conveyance was made merely to secure the payment of money due from Walker to Kinney, still, unless Loewenthal had notice before he purchased," etc.

Now this is not a finding that these deeds were absolute and not mortgages,—so that this issue was not decided nor intended to be decided as they claim.

The statute of this State makes the opinion of the Supreme Court part of the record in the cause.

§ 16, Chap. 37, COURTS. In the decision of cases submitted to the Supreme Court, the opinions of the justices shall be delivered in writing and filed with the other papers. *Such opinions shall also be spread at large upon the records of the Court.*

The second issue as propounded by them is, was Loewenthal et al. purchasers without notice?

It is to be noted here that all the deeds under which Loewenthal *et al.* claim title were obtained after the assignee was appointed, and none before; so that this is an issue between the assignee as such and Loewenthal et al. As between Kinney and the assignee there is and can be no question but the assignee took the legal estate charged with the lien in favor of Kinney.

This presents a different issue from that presented in the case cited of *Scott, assignee*, v. *Kelley*, 22 Wall. 57.

One of the series of facts going to show notice, the proof of debt in bankruptcy, has added to it additional strength as a federal question from this circumstance, that the rights of the assignee as such to the assets of the bankrupt are impaired by acts done after he was appointed such, and after the party doing them was advised that the property was part of the assets. For I presume if I had proved that Loewenthal in fact *read* these schedules, or in any other way was notified in fact of their contents touching this land, that would have been notice. But this case goes farther; for, by the proof of debt in bankruptcy, he, under the act of

Congress, acquires rights in the assets, and the assignee acquires rights and is charged with duties in his favor. These rights, each of them, as against the other, then are rights claimed under and depend upon the construction of the bankrupt law.

And not only that, but a judgment in a United States court, and the rights of the parties springing out of it are federal questions, which, if denied, can only finally be protected by this Honorable Court in their full extent, and *this is a judgment.*

The third issue presented by them, the bar of § 5,057, bankrupt act, and the fourth issue presented by the assignee, under the same section are federal questions.

And upon this last issue I claim that this Court should review all the reasons assigned by the Court below for denying the right claimed, and this brings in review both questions that the counsel claim are exclusively State and not federal.

Respectfully submitted,

W. T. BURGESS,

Of Counsel for Plaintiff in Error.

110-222

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1883.

ROBERT E. JENKINS, ASSIGNEE IN BANKRUPTCY, &C.,

vs.

BERTHOLD LOEWENTHAL ET AL.

} Error to the Supreme Court of Illinois.

STATEMENT OF CASE.

This is a writ of error to the Supreme court of Illinois.

There are three distinct propositions or questions in this record, each of which was a sufficient basis for the disposition of the case in the Supreme court of Illinois.

Only one of these questions is what is known as a federal question under section 709 of the United States Revised Statutes.

There are two other distinct propositions decided by that court not federal in character, each of which is a sufficient basis for the judgment of that court. This the court will at once recognize by reading the opinion of

that court in this record (Abst., 106), also found reported in 105 Ill., 157. If this statement be correct, then it will be unimportant whether the federal question involved was correctly decided.

Issues Involved.

For the purpose of demonstrating to the court what the issues were in the Supreme court of Illinois, we will state the pleadings and judgment in the case.

Robert E. Jenkins, assignee in bankruptcy of Samuel J. Walker, filed his bill in the Circuit court of Cook county, Illinois, on *May 27, 1881*, alleging the adjudication of S. J. Walker as a bankrupt on petition filed April 26, 1876, his appointment as assignee, and the deed to him as such assignee, on July 31, 1878, of all the assets, property and effects of said bankrupt.

That lots 21 to 37 inclusive, in block 10, Walker's dock addition, the premises in question, were scheduled by Walker the bankrupt, in which schedule it is stated that the title to said property was held by E. Kinney to secure any indebtedness due E. Kinney & Co., the amount of which was unsettled, and subject to a trust deed securing, with other property, $150,000, held by the International Bank and others as security.

That on January 9, 1873, S. J. Walker and wife conveyed by full covenant warranty deed to said Eli Kinney said lots 21 to 34 inclusive, in fee for the pretended consideration of $155,100, recited in said deed, and on January 9, 1874, being seized in fee, conveyed said lots 35, 36 and 37 by full covenant warranty deed to said Kinney. The pretended consideration recited therein being $31,230.

That said deeds, though absolute in form, were, in fact, to secure an indebtedness of $110,000, evidenced by Walker's notes, then due by him to Kinney & Co., of Cincinnati, and was, in fact, only a mortgage.

That at time of filing said petition to be adjudicated a bankrupt, S. J. Walker was in the actual possession of said premises.

That Kinney, both before and after Walker was adjudicated a bankrupt, admitted that said deeds to him were only intended as security for the payment of said notes, and that complainant, not knowing that Kinney ever did set up any other state of title, relied upon such statements of Kinney, and the schedules in bankruptcy of Walker stating the same thing, and was governed thereby in his acts until after the expiration of two years from the date of the deed to him, as such assignee, after which time, and on March 26, 1880, he, in fact, for the first time, learned that Kinney had conveyed said premises, and that the same had become vested in Kinney's wife, and that on November 6, 1880, said Kinney and wife, for some nominal consideration, had conveyed said premises, through one Kuhn, to appellee, Berthold Loewenthal. That all of said deeds were without any good or valuable consideration in fact, and with notice to Loewenthal of the rights and equities of Walker and complainant, his assignee, in said premises, and in fraud of plaintiff's rights.

That the notes held by Kinney, so secured upon said premises, never passed out of his hands into the hands of said Loewenthal.

Complainant then sets up the securities held by Loewenthal, Bauer, Schoelkopf and the International Bank, secured by a prior trust deed to Rogers, and executed by

said Walker, dated December 29, 1871, and recorded January, 1872, upon the same premises; alleges that said Bauer filed a bill on August 29, 1874, to foreclose same, making Walker the mortgagor, Kinney the party in whom the title stood of record, and others parties defendants, and on April 25, 1878, a decree of foreclosure was entered, ordering the sale of said premises, and that the master sold the same on June 24, 1878, to Jacob Rosenberg, the vice-president of the International Bank, for the use of Bauer, Loewenthal, Schoelkopf and the International Bank.

That a writ of error was afterwards sued out and prosecuted by Jenkins, assignee, etc., in the Appellate court of Illinois. Pending same Loewenthal was appointed receiver to take charge of the premises in question and preserve the same. Pending said writ of error, and on February 16, 1880, an agreement was entered into between Loewenthal, Kinney & Rosenberg, trustee for the parties for whom he had bought at said master's sale, for docking and leasing said premises, subject to the decision of the Appellate court, and said premises were thereunder docked and leased to parties who are now in possession.

That on September 27, 1879, the time of redemption having expired, the master executed and delivered a deed for said premises to said Rosenberg for the use of Loewenthal, Bauer, Schoelkopf and the International Bank.

That certain propositions for settlement, pending said writ of error, were set on foot by Loewenthal, the president of the bank, with Kinney, and such fact coming to the knowledge of complainant, he caused a notice to be given to the counsel for said Loewenthal dated January, 1880.

That notwithstanding said notice, Loewenthal, on his own behalf, and on behalf of Bauer, Schoelkopf and the bank, went to Cincinnati, and on November 23, 1880, procured a release of errors from Kinney in said suit so pending in error in said Appellate court, and also a pretended deed of conveyance from Kinney and wife, before set out, of the premises in question.

That Loewenthal then had notice, and knew that Kinney did not own said premises, but held the same as security, and that Kinney did not assign the notes to him, but has since assigned the same to A. C. Badger.

That Loewenthal, April 3, 1879, proved a claim in bankruptcy against the estate of Walker, and that thereby he was charged with notice of the claim of Walker and his interest in said lands.

That Loewenthal should be compelled to release and convey said premises to complainant Jenkins as such assignee. (Abst., 1–12.)

Prayer that the title so acquired by Loewenthal of Kinney be declared and adjudged either a nullity, or to be held in trust for assignee, and for a conveyance of same to him, and for general relief. (Abst., 1–12.)

By way of supplement, complainant alleges that the decree so entered in sald Bauer foreclosure suit had been reversed by said Appellate court.

Answer of Loewenthal *et al.* (See Abst., 13–17, 19, 20.)

Admits the bankruptcy of S. J. Walker, and that complainant was elected his assignee, as alleged in bill. The answer does not raise any question that such assignee has acquired all the rights of Walker, if anything, in said premises.

The answer alleges the purchase of Walker by Kinney on January 9, 1873, and conveyance by full covenant warranty deed to Kinney of lots 21 to 34, inclusive, which was recorded on January 21, 1873, and also the purchase of Walker by Kinney on January 9, 1874, and conveyance by full covenant warranty deed to Kinney of lots 35, 36 and 37, which was recorded February 19, 1874, as alleged in bill, and that said purchase was for a full and valuable consideration then and there paid.

They deny that said conveyance was as a security for payments of indebtedness as alleged in bill, but that the same were absolute purchasers, and said deeds absolute deeds.

That long prior to Walker's petition to be adjudicated a bankrupt, he knew that Kinney claimed to be the absolute owner of such premises, adversely to Walker. And that complainant knew at the time of his appointment as assignee, and ever since that Kinney claimed said premises adversely to Walker and to said assignee, under and by virtue of the deeds to him aforesaid.

That said pretended cause of action in favor of assignee accrued to him at time of the deed to him as such, and more than two years prior to the commencement of this suit, and the said assignee had knowledge of said pretended cause of action more than two years prior to commencement of this suit.

That more than two years prior to commencement of this suit said assignee knew that Kinney claimed said premises adversely to him under said deeds.

That more than two years prior to commencement of this suit such assignee was put upon inquiry as to the estate and title of Kinney in said premises, and, by reasonable

diligence, he could, more than two years prior to commencement of said suit, have ascertained the claim of said Kinney; and that said assignee, at the time of his appointment as such, had actual knowledge of such pretended cause of action.

That said pretended cause or causes of action in said bill mentioned did not, nor did either of them, accrue to complainant at any time within two years next before commencement of said suit; and they rely upon the statute of the United States in that behalf provided, in like manner as if they should have specially pleaded the same in bar of said bill and of said pretended cause or causes of action.

Also admit the other deeds as set out in said bill, and the deed to said Loewenthal; but deny that they, or either of them, were without consideration; and allege that said assignee had actual knowledge of all of them when made; and allege that the deed from Kinney to Burgoyne, and from Burgoyne to Mrs. Kinney, were for a valuable consideration, and that Mrs. Kinney took said deed and paid a full and valuable consideration therefor, without any knowledge or notice on her part of the pretended claim of said assignee, and she believed that Kinney was the owner thereof, and had the right to convey same to Burgoyne, and that Burgoyne had a right to convey same to her, and that Mrs. Kinney was paid $20,000 by said Loewenthal at the time of the conveyance to him, which was all said premises were worth.

Admit the trust deed to Rogers dated December 31, 1871, and that notes were secured thereby as alleged and set out in the bill of foreclosure filed by Bauer, as alleged in bill, and that a final decree was rendered in said foreclosure suit on April 25, 1878, and that a writ of error

was sued out of the Appellate court as alleged. That Loewenthal was under said foreclosure proceedings appointed receiver of said premises, but only until the time when the master made the sale to Rosenberg, the purchaser under said foreclosure.

Admit the contract for docking and leasing said premises made February 16, 1880, between Loewenthal, Kinney and Rosenberg, who then held the master's deed for the use of Loewenthal, Bauer, Schoelkopf and the bank, but deny that Loewenthal made said contract as receiver but as owner of part of the beneficial interest under said master's decree to Rosenberg. Deny that Loewenthal exercised any control over said premises as receiver from time of said master's deed dated September 27, 1879.

Deny all knowledge of the letter by Burgess to Rosenthal & Pence, dated January 14, 1880, and deny that it is notice of anything to them.

Admit the deed of Kinney and wife to Kuhn, and of Kuhn to Loewenthal was for the benefit of himself, said Bauer, Schoelkopf and the bank, and allege that he paid $20,000 therefor, and admit that Kinney obtanied a release of all claims in said Bauer foreclosure suit.

Admit that neither Kuhn nor themselves ever held said notes of Kinney referred to in bill—and deny that Kinney had only a security for such notes, or that he did not have any other title than a mortgage.

Deny that they knew that Kinney held said premises as security simply, and not absolutely, as the same appears by record, and deny that they had notice, which should have put them on inquiry.

Deny that Badger holds said Kinney notes, or that he paid anything therefor.

Deny that the proof of a claim by Loewenthal against the estate in bankruptcy of Walker, was any notice to them of assignee's claim. (This was not the same indebtedness secured on these premises and foreclosed in the Bauer case.) (Abst., 13–18.)

Admit the reversal of the decree in said Bauer foreclosure suit by the Appellate court.

Upon the hearing in the Circuit court of Cook county, the bill of the assignee, plaintiff in error here, was dismissed for want of equity.

The case was appealed to the Supreme court of the state, by the assignee, and the following errors were assigned by him in that court:

1. That the Circuit court admitted improper evidence.

2. That the Circuit court dismissed the bill of complaint, whereas it should have rendered a decree for complainant therein, as prayed for.

3. That it refused to consolidate with, and hear this case, in the Bauer case. (Abst., 105.)

The Supreme court of the state affirmed the judgment of the Circuit court of Cook county in this cause, and rendered its opinion which will be found (Abst., 106); also see opinion in 105 Ill., 157.

It is apparent from the pleadings and judgment that the following issues were submitted to and decided by the Supreme court of Illinois in favor of defendants in error:

First. That the conveyances by Samuel J. Walker and wife to Eli Kinney of lots 21 to 37, inclusive, in block

10, Walker dock addition, *were absolute in fact as they were in form*, and were not made as security, and that Loewenthal, Bauer, Schoelkopf and the bank claiming under Kinney take the absolute title so possessed by Kinney.

Second. That Loewenthal, Bauer, Schoelkopf and the bank, purchased the title of Kinney for a valuable consideration paid, *without notice or knowledge* that Kinney's title from Walker was held by Kinney as a mortgage.

Third. That the suit of Jenkins assignee of plaintiff in error, was barred under § 5057, Rev. Stat. U. S.

The foregoing issues were distinctly raised and decided.

The first and second do not involve any federal question. Either is a sufficient basis or reason for the decision of the Supreme court of the state; and if it were conceded that the third, being a federal question, was erroneously decided, yet the case would not be reversed for that reason if the other issues were a sufficient basis for the judgment of the Supreme court of Illinois; and it matters not, under such circumstances, whether this court be of the opinion that the other issues were improperly decided. Having been decided by the Supreme court of the state, and they involving only the general principles of jurisprudence, not depending upon any federal statute, this court will not review the same, nor will it reverse the judgment, because the issue involving the federal statute was erroneously decided.

Murdock v. *City of Memphis*, 20 Wall., 590.

The fact that this suit was brought by an assignee in bankruptcy, who claims his title by virtue of his appoint-

ment under a United States Statute, does not raise a federal question. No issue was taken as to the validity of his appointment, or that he took whatever title his bankrupt possessed.

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In that case this court said: "The question presented "for the decision of the state court was not whether if "the bankrupt had title, it would pass to his assignee by "the operation of the bankrupt act, but whether he had "title at all. The court decided that he had not. Such "a decision by a state court does not present a question "of which this court can take jurisdiction upon a writ of "error."

It might be claimed even that the third issue decided, that of the limitation provided by the federal statute, did not raise a federal question, inasmuch as the claim under that statute was *allowed*, and inasmuch as plaintiff in error did not claim anything under a federal statute. But as this court entertained jurisdiction of the same question in *Jenkins* v. *The International Bank*, 106 U. S., 571, we will not urge the question further.

Counsel however contends that upon the issue of *notice* to the purchaser, that Kinney held his title from Walker as mortgagee, and not as absolute owner, he raised the question that Loewenthal had *notice* by reason of his proof in bankruptcy of a certain other claim *in the matter of the estate of Walker the bankrupt*, and by reason of the fact that in one of Walker's schedules in bankruptcy, he stated that the conveyance by him to Kinney was intended simply as a mortgage, whereby, counsel contends, a federal question was raised. He contends that the schedule was constructive notice to Loewenthal that Kinney held his title as mortgagee, and hence the decision of

the Supreme court of this state that such fact or facts did not constitute notice to Loewenthal, was denying to him a right or title which he claims resulted to him under a federal statute.

It is a little difficult to see how plaintiff in error claims, by virtue of the foregoing, any right or title under a federal statute. Does not such question of notice depend entirely upon the general principles of jurisprudence? Suppose such schedule could constitute notice, does that in any manner depend upon any federal statute, simply because it is found in a proceeding which was instituted by virtue of a federal statute. As well claim that any pleading, deposition, or other paper found in any suit instituted in the United States courts, when decided not to be notice in some other suit, involved a federal question simply because such proceeding was instituted under or by virtue of a federal statute.

The statute of the United States does not declare that such a schedule shall be notice of its contents to any one; whether it is notice or not does not depend upon any federal statute, but upon general principles.

It is clear that such question of notice or no notice is one entirely governed by general principles, and does not depend upon a statute of the United States.

But counsel does not make any progress, for still another question remains, which was raised and decided against him in the state Supreme court, viz: That the conveyance by Walker to Kinney was an absolute deed, and not a mortgage. He cannot by any possibility eject a federal question into that issue. And there being a single issue or question sufficient for the disposition of the case, in which is not involved a federal question, this court will

refuse to consider the case, but will dismiss the writ of error.

As to the merits of the controversy, we deem it unnecessary to discuss the same, but out of an abundance of caution, we file herewith our argument in the Supreme court of Illinois, which is bound up with these remarks.

We might however refer to the fact that the decision of the Supreme court of Illinois upon this federal statute of limitation is undoubtedly correct, and will be governed without further controversy by the case of *Jenkins* v. *The International Bank*, 106 U. S., 571.

We also upon this question refer to point VI. of our brief referred to before, in the Supreme court of Illinois.

Respectfully submitted.

JULIUS ROSENTHAL,
A. M. PENCE,
Counsel for Defts. in Error.

110 — 222

IN THE

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION.

SEPTEMBER TERM, A. D. 1882.

ROBERT E. JENKINS, ASSIGNEE, &C., *Appellant*,

v.

JACOB ROSENBERG, BERTHOLD LOEWENTHAL ET AL., *Appellees.*

Appeal from Circuit Court, Cook County. Tuley, J.

BRIEF AND ARGUMENT FOR APPELLEES.

ROSENTHAL & PENCE,

ATTORNEYS FOR APPELLEES.

CHICAGO:

PRESS OF BEACH, BARNARD & CO., 104 RANDOLPH STREET.

1882.

Statement of Case.

On May 27, 1881, Robert E. Jenkins, assignee in bankruptcy of Samuel J. Walker, filed a bill in the Circuit court of Cook county, for the purpose of declaring null and void the title obtained by Loewenthal, by virtue of a deed from Eli Kinney and Martha S. Kinney, his wife, running to Louis Kuhn, as grantee, bearing date November 16, 1880, and by virtue of a deed from Louis Kuhn to said Loewenthal, bearing date November 16, 1880, to lots 21 to 36 inclusive, and the south half of lot 37, all in block 10, S. J. Walker's Dock Addition to Chicago, or that such title so obtained by Loewenthal should be held in trust for said assignee.

The title so conveyed by Kinney and wife had been obtained from S. J. Walker by two warranty deeds to said Kinney, one bearing date January 9, 1873, recorded January 21, 1873, conveying lots 21 to 34 inclusive, and one bearing date January 9, 1874, recorded February 19, 1874, conveying lots 35, 36 and south one-half of lot 37, in said block 10.

The bill alleged that these deeds from Walker to Kinney, though absolute in form, were in fact intended as security for an indebtedness of Walker to Kinney of about $110,000.

The bill also alleges that when Loewenthal bought these premises, that he knew and had notice that said deeds were only intended as security.

It also alleges that the indebtedness at the time of such conveyance, was held by Kinney, but was not transferred to Loewenthal.

The bill does not seek to redeem from such pretended mortgage; does not offer to do equity, but simply asks to have such deed held by Loewenthal to be a nullity, as the indebtedness was not transferred to him, or that he be declared to hold the same in trust for Walker's assignee in bankruptcy.

The answer denied that such deeds by Walker to Kinney were not absolute in fact as in form; denied that defendants knew or had notice that such deeds were for security only. Alleged that Kinney, from the time of the conveyance to him up to time of conveyance to Loewenthal, claimed such deeds to be absolute, and a fee simple title absolute to have passed; that Kinney had been in actual possession of said premises from the first, claiming as owner. Alleged that Walker always admitted Kinney to be the actual owner thereof, and treated him as the owner, and that he always knew that Kinney was claiming the same as owner; that Jenkins, from the time he was appointed assignee of Walker on July 31, 1878, knew that Kinney claimed said premises adversely, and that both he and Walker acquiesced in such adverse claim, and pleaded the United States two years statutes of limitation, in bar of such pretended relief, which provides that "no suit at law or in equity shall be maintainable in any "court between an assignee in bankruptcy and a person "claiming *an adverse interest* touching any property or "rights of property transferrable to or vested in such an "assignee, unless brought within two years from the time "when the cause of action accrued for or against such "assignee."

§ 5057 Rev. Stat. of U. S.

The defendants also filed a cross-bill to quiet their title and establish the facts set up in their answer, and to remove the claim of Jenkins as a cloud upon their title.

Upon the hearing the Circuit court sustained all the defenses set up to the original bill, and dismissed it for want of equity.

The facts in the case are as follows:

On December 31, 1871, Samuel J. Walker was the owner of the premises above described, and on that day he and his wife executed and delivered a trust deed to John G. Rogers upon said premises, securing three notes executed by him, of same date, of $50,000 each. These three notes so secured were pledged to secure five principal notes executed by Walker to the order of the International Bank, amounting in the aggregate to $54,498, which principal notes so secured afterwards belonged severally to the bank, Bauer, Schoellkopf and Loewenthal, and were secured in common by said three collateral $50,000 notes so secured by said trust deed.

On January 9, 1873, after the pledging of these collaterals, S. J. Walker and wife, by full warranty deed, for a valuable consideration expressed, conveyed to Eli Kinney lots 21 to 34 inclusive, and on January 9, 1874, Walker and wife, by warranty deed, conveyed to Kinney said lots 35, 36 and south half of lot 37, all in block 10, Walker dock addition.

On August 29, 1874, Augustus Bauer, owning one of these principal notes so secured by the three $50,000 collateral notes, filed his bill in the Circuit court of Cook county, against all the parties in interest, including the International Bank, Schoellkopf, Loewenthal, S. J. Walker and Eli Kinney, to foreclose said trust deed to

Rogers, securing said three collateral notes, and out of the proceeds to pay the principal notes so held by Bauer, the bank, Schoellkopf and Loewenthal.

It was alleged in the bill filed by Bauer, that Eli Kinney was the owner of the equity of redemption of said lots, by virtue of the two deeds to him by Walker, above mentioned. (Rec., 377.) Abstract 47.

S. J. Walker, in his answer to the bill, admitted that *Kinney* had purchased said lots of him for a valuable consideration, and was the owner thereof, and that the title to the said premises passed thereby to said Kinney. (Rec., 436.) Abst. 49.

Kinney suffered a default, and on April 25, 1878, a decree of foreclosure was entered in that case, finding the amount due upon said six principal notes, so secured by the three $50,000 collateral notes, secured by the trust deed aforesaid, at about $70,000, and the entire indebtedness due the bank, which was also secured by the same security, by way of general collateral, at $174,000, and upon default in payment of amount due upon said principal notes, ordering sale of said premises, and application of proceeds in payment of principal sum due, etc. Abst. 49-51

Under said decree, sale was made by the master, and Jacob Rosenberg became the purchaser thereof, for the use and benefit of Bauer, the Bank, Schoellkopf and Loewenthal, the owners of said six principal notes.

A deed becoming due upon said sale, the master executed a deed to Jacob Rosenberg, on September 27, 1879, of said premises, he taking the same for the benefit of said Bauer, the Bank, Schoellkopf and Loewenthal.

The decree in that case being entered on April 25, 1878, on April 26, 1878, S. J. Walker filed his petition to

be adjudicated a bankrupt, and Robert E. Jenkins was at once appointed provisional assignee, an officer not known to the bankrupt law, but who is only a custodian for the court. *On July 31, 1878*, Jenkins was regularly appointed assignee in bankruptcy of Walker, and on that day a deed of assignment was made to him.

On June 18, 1878, S. J. Walker, after filing his petition in bankruptcy, sued out a writ of error, from the Appellate court, but none of the parties were brought into the Appellate court until long after Jenkins was regularly made assignee, and the deed of assignment to him.

On December 16, 1879, Jenkins, the assignee in bankruptcy, was substituted, in lieu of Walker, as plaintiff in error, with leave to prosecute the writ of error.

Eli Kinney was brought into that foreclosure suit by publication, and pending the writ of error, Kinney made application, under the statute, to the Circuit court, to be let in to defend the original suit, which application was granted.

Thereupon, Kinney, on July 26, 1878, filed his answer to Bauer's original bill, and to the cross-bill of Miller *et al.*, and also, on April 21, 1879, filed his cross-bill, in all of which he set up and alleged and claimed that he was the *owner in fee* of said premises, by absolute purchase, under the deeds from Walker before set out, and that he was in possession, claiming said premises. (Rec., 465, 466, 485.)

Mr. W. T. Burgess and Joseph N. Barker were the solicitors and counsel for Kinney, and drew the pleadings, in which he alleged and claimed that he was the absolute owner in fee. At the time when Burgess and Barker drew these pleadings for Kinney, they and A. C. Badger

had a contingent contract for fees with Kinney, in which it was recited that Kinney *was the owner in fee* of said premises, wherein he agreed to pay Burgess, Barker and Badger the sum of $12,000 for fees, in case they should succeed in defeating the claim of Loewenthal, the bank, Bauer and Schoellkopf. The contract was nominally made between Kinney and Badger, but on the same day, by letter of Burgess and Barker, they became parties to the contract, and accepted of its terms, and agree to prosecute suits in Kinney's name, as the owner under and by virtue of said contract. (Rec., 806-810.)

At the same time that Burgess and Barker were representing Kinney, and were claiming for him that *he was the absolute owner in fee of said premises*, they were also the solicitors and counsel of Jenkins, the assignee of Walker, and through Jenkins were attempting to have the decree in the Bauer case reversed by the Appellate court. (Rec., 290, 299, 938, 842.) There was much other property involved in that decree besides the Kinney property.

It was shown that at the same time, and during the year 1878, Jenkins had actual knowledge of this contingent contract between Kinney, Badger, Burgess and Barker (Rec., 806, 873), and that Jenkins had actual knowledge that Kinney had filed his answer and cross-bill in the Bauer case, and knew that Kinney was claiming to be the actual owner of said premises.

Since the appointment of Jenkins assignee, July 31, 1878, Badger, who had been an expert witness for Walker in the Bauer case, who made this contract with Kinney as the owner, who furnished all the information to Burgess and Barker upon which they drew the pleadings for Kinney, in which he asserted his ownership, was also the

agent of Jenkins, the assignee; acted under his directions and instructions in the management of the whole litigation from July 31, 1878, and advised with him as to all the facts. (~~Rec., 873–878; not well abstracted.~~)

During the progress of the Bauer case in the Circuit court, and up to February 15, 1880, Kinney was in the actual possession of said premises by tenants, receiving rent therefrom, and was in the actual possession thereof at the time of the deed of assignment to Jenkins, as assignee in bankruptcy of S. J. Walker. (~~Rec., 570–577.~~)

The writ of error in the Appellate court was pending from June 18, 1878, until June 14, 1881. And so was the defense of Kinney in Circuit court pending from July 26, 1878, up to November 25, 1880. (~~Rec., 465, 267.~~)

On March 1, 1878, Kinney, so claiming to be the owner in fee of these premises, executed a mortgage or trust deed to Kyle & Donham, which was filed for record in the recorder's office of Cook county, Illinois, on April 6, 1878, in which he covenanted that he was the *owner in fee* of said premises, and Jenkins, taking title to these premises from Walker, if Walker had any title thereto, on July 31, 1878, had notice by the record of this trust deed in his chain of title, *which alleged, under Kinney's signature, that he, Kinney, was the true and lawful owner thereof.* (~~Rec., 746.~~)

After Rosenberg had taken out his master's deed for the benefit of Loewenthal, Bauer, Schoellkopf and the the bank, and pending this writ of error, and the defense of Kinney in the Circuit court, it was agreed between Kinney, claiming to own the equity of redemption in fee simple, absolute, and Rosenberg, representing the owner under the master's deed, and Loewenthal, who was a *cestui*

trust under the Rosenberg master's deed, and was to advance the money to build docks upon this property, and to put it into shape to produce and income. (Rec., 795.)

Loewenthal was to advance, and did advance some $30,000 for that purpose (Rec., 907), and upon the final decision of these suits, this expenditure was to be repaid before anything else, and everything to abide the event of the suit. (Rec., 795.) This contract was made in the interest of all those supposed to be interested.

During the negotiation, and up to the time of the execution of this contract, Kinney, and not Jenkins, claimed to be the owner; Jenkins had actual knowledge of the negotiation for this contract, and before it was consummated, as to what was being done, and of his, Kinney's, claim to be the owner.

Mr. Jenkins' attorneys, Mr. Barker and Mr. Burgess were present and assisted in the negotiation. Mr. Barker signed the contract as attorney in fact for Mr. Kinney, and Mr. Burgess was present, advising in the matter, but none of them pretending to any one that Jenkins had any interest whatever in the premises, but all the time holding out Kinney as the real owner.

Badger knew about the contract before it was signed; was advised with; he informed Jenkins, the assignee, what was going on, and that Kinney was going to sign the contract as the owner, and that both he and Burgess specially represented Jenkins, while Barker specially represented Kinney; and yet no one intimated that Jenkins had any interest in the property. (Rec., 831, 836, 848, 854, 864, 906, 936, 940, 965.)

Barker, Burgess and Badger had in their pockets the

contract with Kinney for a contingent fee, in case the litigation should be in Kinney's favor. (~~Rec., 806, 810, 812.~~) Ohio St. 69.

And no one even dreaming or supposing that Jenkins was lying by, keeping mute, for the purpose of catching the $30,000 that Loewenthal was putting into the docks, as he is now attempting to do. Jenkins did not sign that contract; he claimed nothing then by virtue of it; and that he claims now that he had any interest in the premises results wholly from the sequel. Kinney's lawyers lost their $12,000 contingent fee, and they seek now, through Jenkins, to make it up in another way, by claiming that Jenkins was the owner all the time, and not Kinney, although Kinney would have been the owner, had the machine worked as counsel supposed it would, and we would then have never heard of the claim of Jenkins. Verily it is hard to serve two masters.

The sequel is this: Loewenthal and Kinney becoming wearied of litigation, Loewenthal, in November, 1880, went to Cincinnati and bought out Kinney's claim and interest, and paid $20,000 cash for it, subject, of course, to the prior trust deed held by them, or rather subject to the decree and sale above referred to, which was then unreversed.

Had Loewenthal then known that Burgess, Barker and Badger had a contingent fee depending upon their success in beating him, he might, or might not have had consideration for them. Hereafter they should advise their opponent of such champertous contracts, if they want protection. But we think any one can see in this case that no settlement of this wearisome litigation would have resulted, had they been so advised.

Kinney had in the mean time relieved the land from

the Kyle and Donham trust deed, and had, for a valuable consideration, conveyed these premises to his wife, Martha S. Kinney; so that Loewenthal bought of Mrs. Kinney her interest in these premises, and paid her $20,000 cash therefor (Abst., 820, 917–919), and had her and her husband convey same to Louis Kuhn, a banker in Cincinnati, who a few days afterwards conveyed the same to Loewenthal, who now holds them for himself, Bauer Schoellkopf and the bank.

At the same time, Kinney executed a release of all errors in the suit, which was then pending in the Appellate court on writ of error, and stipulated that a decree might be entered in Circuit court in the Bauer case, still pending as to himself, confirming the original decree entered on April 25, 1878. (Rec., 732.)

An order was accordingly entered in the Appellate court, affirming the decree of the Circuit court, as to Kinney and the premises in question (Rec., 732), and on the same day, November 25, 1880, an order was entered in the Circuit court affirming the decree of April 25, 1878, as to Kinney, as is provided by section 19 of the *Chancery Act*. (See Rec., 728.)

It was then supposed that we had reached an end of the litigation as to these premises. The matter seemed *to be closed.*

But we had forgotten the indefatigable character of appellant's counsel.

They have now boxed the compass.

Up to this time they held a contract from Kinney whereby they were to receive $12,000 for establishing the title in him in fee, and defeating the claim of our clients upon the property. Now they turn around and file a bill

in the name of Jenkins, assignee, and with *naivete* allege that Kinney never did have the title in these premises, but allege that the deeds from Walker to Kinney in 1873 and 1874 absolute upon their face, were in fact only intended as mortgages, and that Lowenthal, Bauer, Schoellkopf and the bank knew such fact; and hence, that the conveyance to Loewenthal was actually void, as the indebtedness held by Kinney was not transferred to Loewenthal; and hence Jenkins asks to have the deed to Loewenthal declared void, and that he, Jenkins, may take the property without even offering to pay the indebtedness secured thereby, or the $20,000 paid by Loewenthal. Jenkins, by his astute counsel take the bold position that Jenkins can take this property without paying anything.

They do show that at the time when those two deeds were made by Walker to Kinney in 1872, that Walker was indebted to Kinney in the sum of about $110,000, all of which fell due April 4, 1874, and that the agreement between Walker and Kinney at that time was that Kinney should sell these premises, and with the proceeds pay himself, and if anything remained of the proceeds thereafter, that it should be paid over to Walker. This Kinney testified to (Rec., 194), and they produced the notes held by Kinney, but they do not call Mr. Walker to prove the transaction.

But if the transaction was such as testified to by Kinney, it does not show that Kinney had no authority to sell and convey the premises, but precisely the contrary. He testified that he had such authority (Rec., 196, *et seq*). They did not call Walker to disprove this fact. And while Jenkins, Walker's assignee, might have the value of the premises conveyed, credited upon the indebedness of Walker to Kinney, it in no manner gives any right to

the assignnee to call in question the sale. Kinney is not making any attempt to enforce the indebtedness against Walker's estate, but quite the reverse. It seems that he has since the conveyance surrendered the notes to Walker's assignee, as the latter produces them and puts them in evidence in this suit. (Rec., 277.)

But, whether or not, as between Kinney and Walker's representative it can be called a mortgage, we showed the following defenses:

First. That Loewenthal at the time of his purchase from Mrs. Kinney and payment did not have knowledge or notice either constructive or actual that the deeds to Kinney from Walker were not absolute in fact as they were in form.

Second. The conveyance by Walker to Kinney of the fee absolutely implied a power of sale. A fee always implies a power of sale. Besides Kinney testifies and it is undisputed that he had authority to sell, and was only bound to account to Walker for the proceeds. This power of sale implied by conveyance of the fee is just as authoritative, legal and binding as if express authority had been conferred in the instrument.

Third. Walker, and under him, his assignee in bankruptcy, are estopped by acts *in pais* from asserting that the conveyance by Walker was not absolute in fact as in form.

Fourth. Walker, and under him, his assignee, have been guilty of laches in not asserting their rights, if any they have.

Fifth. The United States statute of limitation is a bar to the suit by the assignee against all persons claiming property adversely. Over two years having elapsed after cause

of action accrued to the assignee before suit brought. (See Rev. Stat. U. S., § 5057.)

Sixth. The decree of the Appellate court affirming the decree of the Circuit court, as against Kinney, and the confirmatory decree of the Circuit court, are an estoppel by the record to appellant's suit.

Seventh. Walker's assignee seeking equity has not offered to do equity. He does not offer to redeem, but seeks to obtain the property in question, freed from all charges. "That which is not honest is not equitable."

ARGUMENT.

I.

Were the deeds from Walker to Kinney bearing date respectively, January 9, 1873, and January 9, 1874, absolute in fact as they were in form? Or, if originally intended as a security, was such original agreement abandoned. And did such conveyance by subsequent ratification, or by way of estoppel, become absolute in fact, as to purchasers under Kinney?

The chief and leading fact is that the deeds from Walker to Kinney were absolute warranty deeds, duly filed for record.

Counsel for appellant seeks to overcome the effect of the record of these absolute deeds in the following manner:

(*a.*) He says that though absolute in form, they were in fact intended as security. He attempts to prove this

assertion in two ways: First, by the deposition of Kinney in this case; and second, by the deposition of Walker taken in another case (the Bauer case), where the question was not in issue.

As to Kinney's testimony in this case, which is all the competent testimony there is upon this question, he says that Walker made these two deeds to him for a consideration, and agreed to take off a prior encumbrance, stated by Walker to be $20,000 or $30,000. That he expected to own the property, and while it was intended to secure the indebtedness due him from Walker, that he, nevertheless, took the title absolutely with the understanding that he could sell the land and apply the proceeds to the payment of his debt, and if anything remained of the proceeds, that then Walker should have credit for it. In other words, that he had a complete power of sale. (Rec., 194–202.)

This is all the competent testimony there is as to how the land was held by Kinney, and without any testimony the conveyance of a fee implies the right to sell.

As is stated in Preston on Estates, Vol., 1, p. 479: "The grant of an estate in fee necessarily confers the "power of alienation."

The proposition needs no authority.

(*b.*) Moreover, it is an established doctrine that where there is a deed of conveyance absolute in form, but originally intended as security, it may be converted into a conveyance absolute in fact by a change in minds of the parties to that effect without any new deed, or by acquiesence or ratification.

Carpenter v. *Carpenter*, 70 Ill., 457.
Maxwell v. *Patchen*, 29 Ill., 42.

Ferguson v. *Tallmadge*, 20 Ill., 581.
Petman v. *Sofley*, 64 Ill., 156.
Jenkins v. *Peirce*, 98 Ill., 650.

In *Carpenter* v. *Carpenter*, this court held that "if a "party makes an absolute conveyance of land as a se- "curity for the payment of money, he may abandon the "payment of the debt, and cancel the secret agreement, "and treat his conveyance as absolute instead of a mort- "gage, and he will be bound by such election."

In *Maxfield* v. *Patchen*, this court said: "We think the "evidence is abundant to show that appellee had aban- "doned the contract. *It is true, he did not in terms say* "*so, but all of his acts, subsequent to the maturity of his* "*notes, seem to unmistakably indicate such a design.*"

"And had the land not been improved, or had it not ap- "preciated in value, the presumption, from his previous "conduct is, that he would never have asserted this claim. "To permit him to do so, would be to enable him to per- "petrate a fraud upon appellant. If he purchased without "notice, he must be protected. If with full notice of all "the circumstances he was induced by the acts of the ap- "pellee to believe that he had abandoned his claim, it would "be inequitable and unjust, to permit him to recover the "premises with the improvements, and enhanced value of "the land. Appellee has been guilty of *laches*, has stood "by and failed to assert his right when it would have in- "jured no person. *He did not act or even claim the* right "to enforce the contract, when it would have produced no "injury. The right to treat this contract as security for a "loan, being a verbal secret understanding between the par- "ties not appearing in the written agreement, may be shown "to have been voluntarily abandoned, altered or rescinded

" by the agreement of the parties. *If it appeared in the* " *written agreement, then a regular foreclosure, a release* " *or satisfaction would be necessary*, as between the parties " themselves, the proof of abandonment or a rescission " might be required to be more rigid than where the right " of third parties had intervened. This view of the case " is fully sustained by the case of *Ferguson* v. *Tallmadge*, " 20 Ill., 581."

In the case of *Jenkins, assignee*, v. *Pierce*, 98 Ill., 653, the assignee of Walker (this being the same Jenkins and the same Walker) was held to be a mere volunteer and to step into the shoes of Walker, and Walker having acquisced in a deed which would have been held a mortgage had Walker so desired, this court held that Walker's satisfaction that it should be held a deed, and his acquiescence therein could not be disregared by his assignee, but would also bind him.

Now, what are the facts in this case, touching this aspect of it?

The deposition of Walker taken in the Bauer case, is incompetent for any purpose in this case, as we will show, but conceding it for the nonce, and we then find him saying, that it was originally assigned to Kinney for the purpose of securing a settlement, and that as soon as appellee's indebtedness was cleared off, Kinney was to surrender up the notes held against him. He was not to hold on to Walker's notes until they were paid, but only until a prior mortgage was paid off. (Rec., 292).

The first deed was given January 9, 1873. S. J. Walker did not go into bankruptcy until April 26, 1878, over five years afterwards.

The indebtenness of Kinney was dated January 10,

1873, and matured in eight, twelve and fifteen months after date. The record is barren of any proof that Walker ever at any time prior to his bankruptcy, or Jenkins, his assignee, until May 27, 1881, asserted any claim against this property. He did, however, by his answer to the Bauer bill April 29, 1875, admit the conveyance to Kinney, to have been for a valuable consideration, and to have been absolute, in fact (Rec., 429). Walker did also on January 25, 1875, in his answer to the bill of Kinney, in the United States court, admit the execution of the same deeds to have been absolute in fact as in form (Rec., 528). In the bill filed by Kinney there, Kinney claimed said premises, as his, absolutely, by virtue of said deeds, (Rec., 517). Kinney went into possession of said premises soon thereafter, and rented them as his own, and claimed them absolutely (Rec., 570, lease of Kinney to Walker), and Kinney himself testifies: "Q. You have "treated this property as your own ever since those deeds "were made to you? A. Yes, sir. Q. And brought "suit in Chicago about it, as your own? A. Yes, sir. "Q. You claimed the property as your own? A. Yes, sir. "Q. You claimed it absolutely as against Samuel J. "Walker. Yes, sir., Q. You never pretended any-"thing else. A. No, sir. Q. Neither did Walker— "you claimed to own it? A. Yes, sir. Q. You made "that mortgage to Donham and Kyle, as you claimed to "own it at that time? A. Yes, sir." (Rec., 196, 197, 745).

This was the cross-examination of their own witness.

Walker knew of all these things. He was party to these suits and admitted Kinney's claim. He knew Kinney wasin possession; knew his claim, and never, for five

years after the maturity of Kinney's notes asserted any claim or interest.

And after him comes Jenkins, who knew of Kinney's possession; who knew of Kinney's claim in all these suits; who knew of the mortgage made by him, claiming to be the owner, to Kyle and Donham; who knew of the contract between Kinney, Badger, Burgess and Barker for contingent fees, Kinney claiming to be the owner; who knew of the contract between Kinney, Loewenthal and Rosenberg to build these docks at an expense of $30,000—this improvement to the property; who knew that Loewenthal was about to put all this money into the improvement of this property, on the basis that he (Jenkins) had no interest in it; who waited until Loewenthal had put $30,000 into these docks; who waited until the effect of the great panic of 1873 had entirely subsided, and until the property had appreciated in value; who waited until Loewenthal, for himself and the other appellees, had bought and paid $20,000 cash for Kinney's interest, to settle all disputes.

And then Mr. Jenkins comes forward and asks not to redeem this property, but to take it bodily without any payment of anything, not offering even to pay for the improvements made, for what Loewenthal paid Kinney, nor for the amount due Kinney upon his notes. Hence, this court will apply the principles laid down in the cases cited, and will hold either that Walker had abandoned his claim to have these deeds construed as mortgages, or that he had ratified Kinney's claim to the title, and has estopped himself.

"The evidence is abundant to show that appellee "(Walker) had abandoned the right to redeem. All of "his acts subsequent to the maturity of his notes seem

"unmistakably to indicate such design. And had the "land not been improved, or had it not appreciated in "value, the presumption from his (Walker's) previous "conduct (and from Jenkins' previous conduct), is, that "Jenkins would never have asserted this claim. To "permit him to do so would be to enable him to per- "petrate a fraud upon appellant (appellees). If he pur- "chased without notice he must be protected. If with "full notice of all the circumstances he was invited by "the acts of the appellee (appellant) to believe that he "had abandoned his claim, it would be inequitable and "unjust to permit him to recover the premises with im- "provements and enhanced value of the land. Appellee "(appellant) has been guilty of laches; has stood by and "failed to assert his right when it would have injured no "person. He did not act or even claim the right to en- "force the contract, when it would have produced no in- "jury. The right to treat this contract (deed) as security "for a loan, being a verbal secret understanding between "the parties not appearing in the written agreement "(deed) may be shown to have been voluntarily aban- "doned, altered or rescinded by the agreement of the "parties."

The above language is that of Mr. Justice WALKER in *Maxfield* v. *Patchen.*

There is one fact that ought to be stated here. Jenkins, the assignee, since the conveyance to Loewenthal, has obtained possession of the evidences of indebtedness held by Kinney.

The very indebtedness, the consideration for which the conveyances were made to Kinney, Jenkins, the assignee, introduced in evidence by his counsel (Rec., 277), Badger, who in his answer claims to be the owner (not under

oath), (Rec., 135), purchased, as he claims in his answer, since the conveyance to Loewenthal, does not in his testimony pretend that he owns them, or ever paid a cent for them; but Badger is the admitted agent and *factotum* for Jenkins, the assignee. He says (Rec., 873):

"Since Walker's bankruptcy I have acted for the es-
"tate through Jenkins under his authority and direction
"from the time of his appointment."

This shows how he held these notes, if he did hold them. They came into the possession of the agent of the assignee long after their maturity, and after Mr. Kinney sold the land. Of course these notes were surrendered by Kinney to the assignee in accordance with his understanding with Walker, and it is dishonest for the assignee having secured the surrender of the notes at the same time to ask for the surrender of the property.

II.

Loewenthal purchased of Mr. and Mrs. Kinney, for himself, Bauer, Schoellkopf, and the bank. At the time of the purchase and conveyance to him he paid $20,000 cash for said premises, without knowledge or notice, actual or constructive, of any interest or equity in Jenkins, assignee in bankruptcy of Walker, and hence he is entitled to the premises as against Walker's assignee. The amount paid was all that Kinney's interest was then worth. The premises were subject, at that time, to the trust deeds thereon securing to Loewenthal, Bauer, Schoellkopf and the bank, computing interest at six per cent. per annum, $80,000, which trust deeds at that time stood foreclosed by decree and sale in the Bauer case, the time for redemption then having passed.

There is no proof in the record that Loewenthal had *actual* notice that the deeds to Kinney were intended as security; on the contrary, it clearly appears that he did not have actual notice thereof. (Rec., 915–924.)

Besides it is a principle of the law that actual notice "should be clearly proven, and (the proof) should be of "such character that a disregard of it would be a fraud."

Pitman v. *Sofley*, 64 Ill., 156.

(There is no pretence that the other appellees, Bauer, Schoellkopf or the bank, had any notice, not received by Loewenthal, and hence we will speak only of the pretended instruments of notice with reference to the latter.)

As to constructive notice appellant makes the following points:

1st. Appellant claims that the deposition of Walker in the *Bauer case* is constructive notice to Lowenthal, and that he is chargeable thereby of the interest of Jenkins.

(a.) That deposition was not admissible in evidence in this case for any purpose. It was objected on the ground of incompetency and other grounds. The objection is not noted in the abstract. (Rec., 292.)

That deposition was taken in another case, and was not responsive to any issue in that case. The question as to whether Kinney or Walker was the owner of the equity of redemption was not in issue there.

Depositions under our statute cannot be read in evidence except when taken upon notice in the particular case.

The reason is very evident: Where a particular question is not in issue, the parties care nothing for it one way

or the other, and the parties are not examined with reference to it, and the true state of the particular question involved in the answer is not sifted because it does not affect the case in hand.

"Although the parties are the same, yet if the same "matters were not in issue in the former cause the depo- "sitions are not evidence; the general rule being, as laid "down by DEGREY, C. J., in the judgment, often re- "ferred to, and in other authorities, that depositions to be "admissible, must have been made between the same "parties and upon the same matter in issue."

2 Phill. Ev., *p. 217.

There is no evidence in the record tending to show that Loewenthal ever heard of Walker's testimony in the Bauer case. On the contrary, the only evidence is his own, and he testifies that he never heard of it until since his purchase of Mrs. Kinney. (Rec., 921.)

A man cannot be charged with *actual* notice of that which he never saw or heard of. Is he chargeable with *constructive* notice by the record, of that which is made a part of the record in another case?

It is incumbent upon complainant to prove notice, not upon defendant to disprove it.

The title attacked in this suit was not obtained through the decree or any proceeding in the Bauer case, where that deposition of Walker is found. Hence, it does not operate by way of *lis pendens*, for *lis pendens* would be effective only for the purpose of that suit, as to the issues therein tendered.

The doctrine of *lis pendens* is only upon the ground of public policy, and has the effect of *constructive* notice only in the particular suit, and does not operate boyond it.

Freeman on Judgments, §§ 191, 200.

Mr. FREEMAN in his work on Judgments, § 191, says that "the more reasonable view is that the law of *lis pen-* "*dens* is not based upon presumptions of notice, but upon "a public policy, imperatively demanded by a necessity, "which can be met and overcome in no other manner."

And in § *200* he says:

"The doctrine of *lis pendens* not being founded upon "any of the peculiar tenets of a court of equity as to "*implied or constructive* notice; but being a doctrine com- "mon to the courts, both of law and equity, and resting "upon this foundation that it would plainly be impossible "that any action or suit could be brought to a successful "termination, if alienation *pendente lite* were permitted to "prevail, should not be carried any further than is nec- "essary to answer the purposes which called it into being. "The doctrine of *lis pendens* must therefore be sustained "within its proper sphere and not so enlarged as "to produce results not at all essential to the "carrying the judgment or decree into complete effect. "*Thus, if an action by one plaintiff against two or more de-* "*fendants it appears from the pleadings that one of the* "*defendants has certain equities against the others, but those* "*equities do not in any way affect the present litigation* "*between plaintiff and defendants, and the rights of the* "*defendants between each other are not sought to be deter-* "*mined, no lis pendens can be created beyond the purposes* "*of the suit*, and an alienee of one of the defendants is "not charged with implied notices of the equities between "the co-defendants. It would seem to be pefectly clear, "in the absence of all authority upon the subject, that "there could be no *lis pendens* between co-plaintiffs or "co-defendants in any action not designed to settle the "rights of such plaintiffs or defendants between each

" other, no matter how many facts not material to the " present controversy happened to find their way into the " record."

So the case at bar is perfectly clear. Walker and Kinney were co-defendants to the Bauer bill, and they never impleaded each other, and hence there was no issue, and it matters not how many facts not material to that controversy happened to find their way into the record in that case. They were not notice to any one.

In other words, parties will be bound by all facts or recitals in their chain of title, under which they claim, and which have been put in issue in the particular case, but as Loewenthal does not claim this Kinney title under or by virtue of any proceeding in the *Bauer* suit, of course he is not chargeable *constructively* with anything set out or stated in that suit. That suit went to a decree, but there was no issue in that case between Walker and Kinney. It was simply a foreclosure suit and was for the ascertainment of the amount due, and for a sale of the premises to pay it, both Walker and Kinney being defendants, and it being entirely immaterial to *Bauer* the complaint as to who was the owner of the equity of redemption so long as he had all the owners before the court. Walker did not implead Kinney, and claim that as between them, the deeds to Kinney were in fact only mortgages. On the contrary, Walker, in answering the Bauer bill, admitted that the deeds to Kinney were absolute in fact as well as in form (Rec., 436). So that question was not in issue in the *Bauer* suit, and the decree in the Bauer suit in no wise determined that question, and the purchaser of Kinney, either before or after that decree, had no notice of any contest between Walker and Kinney,

as there was no contest or issue in that suit between them.

A party claiming title under a decree is chargeable with everything *in issue* in that case, and nothing else. Loewenthal, in claiming title from Kinney, does not claim under the decree in the Bauer case.

Even if a party did claim title under a decree, he is not chargeable *constructively* with notice of any paper, document or fact not a part of the issue in the case, although it may be on file in the case.

Freeman on Judgments, § 200.
Dugan v. *Follett*, 100 Ill., 590.

In this case, Mr. Justice MULKEY, speaking for the court, said:

"In the investigation of titles, purchasers look for de-
"crees and judgments against those who appear of rec-
"ord to have been owners, and when it is ascertained
"that a particular decree or judgment does not affect
"the title which is the object of inquiry, it is believed not
"to be customary to look further; and to hold that pur-
"chasers are affected with constructive notice of every
"fact relating to the purchased estate that may happen
"to appear in some of the files of a case, and not else-
"where, would, in our judgment, be carrying the doc-
"trine of constructive notice to a dangerous extent. *
"* * *We hold, therefore, purchasers are not bound to*
"*look beyond the judgment or decree, and the legal effect*
"*it may have on the title, which is the subject of inquiry.*"

The title as between Kinney and Walker (and the assignee steps into the shoes of Walker), *not being the subject of inquiry*, the person purchasing was not chargea-

ble with notice of evidence filed in the case, not pertinent to the issue in that case.

It would be monstrous that a purchaser should be chargeable with notice of all the depositions and testimony in a case when he purchases, though it had nothing to do with the issue decided in the case.

How can Loewenthal be chargeable with *constructive* notice of what Walker said in another case, when the question was not in issue, and under which decree Loewenthal does not claim title.

But it is difficult to see how that can be evidence for any purpose which is not admissible in evidence, as we have seen. 2 Phil. Ev., *p. 217.

(*b.*) Even if Loewenthal had at the time heard Walker's testimony, and had then had actual notice, yet that was on *July 7, 1876* (Rec., 292), over four years prior to the transaction in which he is sought to be charged. It was not heard in the course of the treaty for the purchase of Kinney's interest, and hence cannot operate as notice.

Sugden on Vendors, Chap. 24, §§ 2–7 incl.
2 Lead. Cas. Eq., Pt. I, pp. 137, 138, 146.
Ogden v. *Haven*, 24 Ill., 57.
Distilled Spirits case, 11 Wall., 364.

That such a rule is founded in sound reason is evident from the fact that both Badger and Burgess testify that they were present when Walker testified, but each of them testify that he had forgotten it when they made the contract with Kinney for their contingent fee of $12,000 in which contract it is recited that Kinney is the *absolute owner in fee of said land.* (Rec., 878, 931, 933, 935.)

Mr. Loewenthal, as well as Mr. Burgess and Badger,

testifies not only that he did not recollect the testimony of Walker in regard to that matter at the time he bought of Kinney, but that he never had heard of it until very recently.

In *Ogden* v. *Haven*, this court said: "We agree that "the bare fact that he had at some former time been told "of this purchase by Tooley would not be sufficient to "establish the notice, unless all the circumstances would "lead to the reasonable conclusion that the fact was "within his *remembrance at the time of the attachment.*"

The express evidence is that it was not within his remembrance, and is it to be presumed that he would not have bought and paid $20,000 for the premises had it been within his remembrance?

(*c.*) Walker's deposition in the Bauer case, if admissible, can only be taken as his declaration; as notice it adds nothing by being sworn to. The declaration of a party who has conveyed his title cannot be taken as evidence for the purpose of impeaching the title conveyed by him. It binds no one.

Miner v. *Phillips*, 42 Ill., 130.
Dunaway v. *School Dist.*, 40 Ill., 249.
1 Phillips Ev. (C. H. & E.) *327, note 104.
Trimington v. *Kemmis*, 9 Cl. & F., 779.

2d. Counsel for appellant claims that Walker's schedule in bankruptcy, filed by him in connection with his petition is *constructive notice* to Loewenthal of Walker's interest in said lands. The schedule or inventory made by Walker states that he has some interest in said lands, having conveyed them to Kinney as security. Counsel's

argument is that Loewenthal by proving a claim in bankruptcy against the estate of Walker, thereby entered his appearance, and in some way is charged with notice of everything which Walker has stated in any of his bankruptcy proceedings.

We make the same reply as was made by us to the position that Walker's *deposition* in another case is *constructive notice* of what it contains.

Heaton v. *Prather*, 84 Ill., 332.
Commonwealth v. *Bradish*, 14 Mass., 296.
Miller v. *Larned*, (Sup. Ct. Ill., manuscript.)

No man is chargeable with constructive notice of any instrument made subsequent to the record of the instrument under which he claims.

Actual notice is not and cannot be claimed.

(*a.*) That schedule is in another proceeding, and Loewenthal does not claim the Kinney title under the bankruptcy proceedings. It is not in his line of title; hence, is not constructive notice to him of anything.

(*b.*) It is only when he claims title under the proceeding in which the allegation is made that he can be charged with notice of such allegation. And then the statement or allegation must pertain to the issue involved, and enter into the judgment rendered, before it can be treated as constructive notice.

Dugan v. *Follett*, 100 Ill., 590.

This statement or schedule does not enter into any issue in bankruptcy, nor does Loewenthal claim title under any proceeding in bankruptcy. It is precisely the same question of *constructive notice* as that of *Walker's deposition.*

The assignee had not asserted any title to these premises at the time of his purchase by Loewenthal. And although Walker had scheduled this pretended interest, it does not follow that the assignee would ever implead Kinney, or make an issue upon that question.

(*c.*) Even if Loewenthal had had actual notice of such schedule it would not be binding, as it was not notice obtained pending the treaty for the purchase of Kinney's interest by Loewenthal, unless it could be shown that he remembered such fact at the time of such treaty.

The statute makes the recorder's office the receptacle for instruments of notice, and no place of registry, unknown to our statute, can be created by the courts.

Suppose Mr. Walker had scheduled property of mine as belonging to him, would it ever afterwards have been impossible for Mr. Loewenthal to have bought of me my title as exhibited of record.

Kinney had not been made a party to Walker's bankruptcy proceeding. He had no notice that Walker had scheduled this property. No issue had been tendered to him. How could any one be charged with notice in buying of Kinney unless a suit had been instituted against Kinney, impleading him as to this particular subject.

As before suggested: suppose Walker had scheduled a piece of property belonging to me, as appears by the record, would the proof of a debt by Loewenthal against Walker's estate give him notice of Jenkins' right in my property, before Jenkins brought a bill against me for the recovery of the property, and could not Loewenthal have bought of me, he having no actual notice of such schedule.

If such a proposition were true, then a man going into bankruptcy could bind up the entire property in the district by scheduling an interest in the same, though the assignee never chose to bring a suit for its recovery, and all the parties in the district would have his title bound up irrevocably, without any chance of releasing it, the assignee not chosing to bring his bill and litigate it. Such a proposition answers itself. It is absurd.

3d. Counsel claims that the letter to us, as counsel for appellees claimed to have been delivered to our Mr. Pence, is notice to appellees.

That letter is as follows:

"JAN'Y 14, 1880.

"*Messrs. Rosenthal & Pence, solicitors for the Interna-*
"*tional Bank, and others.*

"GENTS: I am told that attempts are being made "for compromise between Eli Kinney and the parties "whom you represent *of the matters in litigation between* "*them.* As Mr. Jenkins, S. J. Walker's assignee in bank- "ruptcy, is also interested in *these matters*, you are hereby "notified not to proceed therein without his consent.

"Yours, &c.,

"W. T. BURGESS,

"*Solicitor for Jenkins.*"

Now the writer has to say that he has not the slightest recollection of the delivery of that letter to him, but as

Mr. Burgess swears to it, he has not the slightest doubt of the truth of his statement.

But during that period Mr. Burgess was delivering the writer many and all kinds of notices, and the writer does not believe for a moment that he notified Mr. Loewenthal of the receipt of same. Mr. Loewenthal swears that he never heard of the existence of any such letter until long after he had purchased the property, and then it was disclosed by Mr. Burgess. (~~Rec., 909.~~)

It is conceded that there was no actual notice of the contents of this letter communicated to Loewenthal. There is no attempt to prove that there was actual notice of it to Loewenthal.

Is it constructive notice?

(*a*). It is admitted that Rosenthal and Pence were the counsel for Loewenthal, Bauer, Schoelkopf and the bank in all the *litigations* pertaining to the *premises in question* while being carried on in the courts. (~~Rec., 896.~~)

Now, what litigation was there pertaining to the premises?

So far as this record shows, or in the language of the letter, what were "*the matters in litigation between them*," and for which we were their attorneys, for those are the matters we were warned not to compromise or settle.

It was the Bauer suit, a writ of error being then pending in the Appellate court, and also the *Kinney* branch, upon his defense interposed in the Bauer suit after the final decree under the statute.

As the court will remember, the Bauer suit was simply to foreclose a mortgage to which Kinney and Walker

were both defendants. The bill alleged that Walker, subsequent to the Bauer security, conveyed said premises to Kinney for a valuable consideration. (Rec., 363.)

Walker, in his answer, admitted it (Rec., 429), and Kinney, in his answer and cross-bill, alleged that he was the owner in fee by virtue of such conveyances. (Rec., 465-485). Walker was not a defendant to Kinney's cross-bill, and Walker and Kinney did not implead each other, and no question or issue was raised on any of their pleadings, nor was there any adjudication sought as to the rights of Kinney and Walker in that equity of redemption. As to Bauer, Loewenthal, Schoellkopf and the bank, it was a matter of indifference, as to who was the owner of the equity of redemption. The only issues were as to the amount due, and as to the validity of the pledge held by appellees, and not the ownership of the equity of redemption. Now, what did this letter relate to, and in what transaction or matter were we attorneys?

"The matters in litigation between them," referred to in that letter, therefore, had nothing to do with the ownership of the equity of redemption, and hence, when Mr. Loewenthal entered into treaty for the purchase of the equity of redemption, we were not his attorneys for any such matter. We were only his attorneys to ascertain the amount due them, and for the foreclosure of the equity of redemption.

When Mr. Jenkins, therefore, through his attorney, notified us that he claimed an interest in the matters in litigation, we supposed it was the same interests as are referred to by the Appellate court in *Jenkins* v. *Bauer*, 8 Bradw., 661, to wit, an interest in protecting Walker's

covenants of warranty—in protecting the estate of Walker against any claim for a deficit—after exhausting the securities, &c., by reducing the amount found due. And in that case in the Appellate court, these were the only suggestions that were made by their counsel as to their interests in that case.

Why, after their arguments in that case, should we suppose that they claimed any other interests in that litigation than simply a reduction of the amount found due against Walker, and thus protect his covenants of warranty and his estate at the same time?

What had all of that litigation to do with the rights of Kinney to sell us his equity of redemption? How could we be led by anything going before, to suppose that Jenkins claimed an interest in this equity of redemption?

Moreover, a month after this letter was sent, and in February, 1880, and ten months before this purchase of Kinney by Loewenthal, Messrs. Burgess, Badger and Baker all assisted in closing up the contract in the name of Kinney, claiming to be the owner of these premises, for the building of these docks and the renting of these premises, and they said not a word of Jenkins' interest. And yet they would have this court believe that by the letter sent to Rosenthal & Pence they meant to claim an interest in these premises.

Actions speak louder than words. And it is an act false as that of Lucifer, to now claim that they by that letter intended to claim an interest in these premises, when they saw Joseph N. Barker, acting for Kinney as owner or claimant of the equity of redemption, negotiate and contract under a power of attorney, which expressly authorizes Barker to make such contract for Kinney as

owner, and Mr. Burgess, also representing Kinney in all this litigation, standing by assisting and advising, without disclosing by word or act that he was acting for Jenkins. And yet he claims that this letter, written a month before, referred to Jenkins' claim in this property.

If this letter related to an interest in property not in issue in this litigation, why did he write *to us?* He knew we were attorneys only for the matters in this litigation. He is too good a lawyer to do things by *indirection.*

Why did he not notify Loewenthal instead of us, if he meant things which were not in litigation? He either acted falsely, or he did not mean by that letter what he now claims, and he can take either horn he desires.

(*b.*) To bind a principal by notice to his attorney, he must be an attorney for the principal touching the subject matter of the treaty.

There is no pretense that we knew of any treaty for the purchase of these premises, until ten months after, in the month of November, 1880. If there was any in January, 1880, we never heard of it, and certainly we were not counsel for such matter, and it is the never doubted law that such notice must be given to the attorney employed in the matter of that treaty, and during the treaty.

Sugden on Vendors, Chap. 24, §§ 2–7.
2 Lead. Cas. Eq., Pt. 1, pp. 134, 137, 138, 146.

The learned editors of the notes to the Leading Cases in Equity, in Vol. 2, Pt. 1, *p. 66, lay down the rule, as follows:

"However, notice to counsel, agents or solicitors, must, "in order to affect their employer, have been given or

" imparted to them in the same transaction, for if the law " were otherwise, it would, as observed by Lord HARD- " WICKE, make purchasers' and mortgages' titles depend al- " together on the memory of their counselors and agents, " and oblige them to apply to persons of less eminence " as counsel, as not being so likely to have notice of former " transactions.

" The same exception seems to apply, even if the " notice is *personal*, as if a man purchase an estate " under a deed which happens to relate also to other lands " not comprised in that purchase, and afterwards pur- " chase the other lands, to which an apparent title is " made, independent of that deed, the former notice of " that deed will not of itself affect him in the second trans- " action, for he was not bound to carry in his recollection " those parts of a deed which had no relation to the par- " ticular purchase he was then about, nor to take notice " of more of the deed than affected his then purchase."

So, notice to us counsel, in January, 1880, by letter, at a time when Mr. Loewenthal was not in treaty, for the purchase of this land; or if in treaty, such fact was unknown to us, and for which we were not counsel, can not bind us as counsel to recollect that notice in November, 1880, when the treaty was on foot, and when we first knew it was on foot; nor, could it bind Loewenthal, even if it had been communicated in January, 1880, and had it been explicit, so as to put him upon inquiry, for the law, without proof, will not presume that he recollected it in November following.

But it is impossible to mount a constructive notice upon a constructive notice, that is, 1, by construction determine the meaning of its language; 2, by construction presume

that it was communicated to Loewenthal in January, 1880; 3, by construction presume that he carried it in his mind until November, 1880, and thus charge him by spreading a tissue for his feet, and capturing him by a spider's web.

SUGDEN says, ch. 24, § 2: "Not only a mere assertion "that some other person claims title is not sufficient, but "perhaps a general claim is not sufficient to affect a pur- "chaser with notice of a deed of which he does not ap- "pear to have had knowledge."

So had the notice been actually communicated to Loewenthal at the very time of the treaty, it was so general in its character as not to bind him.

This notice was given to us ten months before the treaty, and we were not then employed as attorneys in that treaty; we had never heard of it.

(*c.*) The evidence is clear that there was no treaty for the purchase of this equity of redemption from Kinney until November, 1880. (See Loewenthal's testimony, Rec., 901-910; Glidden's testimony, Rec., 826.) And there certainly is no proof that Pence ever had any intimation of any such treaty until a few days before the sale. (Rec., 914.)

How could he be Loewenthal's attorney in January, 1880, about something he had never heard of?

4th. Appellant claims that upon application for a receiver of this property, on March 26, 1879, he appeared for Jenkins before the Circuit court, and hence that we had notice thereby. The impossible is always happening

in this world, strange as it may seem. Burgess says he appeared for Jenkins. Now, it must be remembered that Jenkins was not a party to that suit. (Rec., 961.) Abst. 102. He was appointed after the final decree, and he never, in any way, was made a party. Kinney was a party to that suit. He had come in as a non resident under the statute; had filed his answer and cross-bill, and the suit was pending as to him, and Burgess was his counsel of record and drew all his pleadings.

Burgess says in his testimony, at the time the application for receiver was made, "I was notified to appear be-"fore Judge Williams, and my recollection is clear that I "stated then that I appeared for Jenkins, as assignee in "bankruptcy. If there was any notice served on anyone, "I do not find it among the papers." (Rec., 933.) Abst. 93.

And further on he says, in regard to his attendance upon that motion: "Jenkins was not a party to that suit "in this (Circuit) court. The application, I think, came "from Badger to go there, and we went over and they "were both anxious to have it done." (Rec., 961.) Abst. 102.

There is nothing of record showing that he so appeared for Jenkins. He says he thinks he announced it orally. Why should I have given him notice as attorney for Jenkins when he admits that Jenkins was not a party to the record? What a notice, whereby a party is to be deprived of his property. But that Mr. Burgess appeared for Kinney in that application, there can be no doubt whatever, for this record shows that he filed the answer for Kinney in that case July 26, 1878, claiming for Kinney the absolute ownership of the property; and on April 21, 1879, Mr. Burgess, as the solicitor of Kinney, filed a cross-bill, in the name of Kinney, claiming for him that

he was the absolute owner of the premises (Rec., 485), which was just twenty-six days after the application for the receiver (Rec., 951); and at the same time Mr. Burgess held the contract from Kinney, for the $12,000 which recited that Kinney was the owner; and yet Mr. Burgess says that he thinks that he announced that he appeared for Jenkins, and would now like to have this court believe that he appeared for Jenkins, while his pockets and his hands were full of papers written all over with the name of Kinney as claimant, while his heart palpitated with expectation of the fee that he was to receive by establishing the ownership in Kinney.

But what of it? The same principle applies heretofore discussed. This was nearly two years before the purchase of this property by Loewenthal. There is no pretense that Loewenthal heard him say that he appeared for Jenkins. There is no evidence, indeed, that Pence heard such statement, if it were made, and if he had, is Mr. Loewenthal to be charged with notice given in the clouds, without proof that anybody heard it, if he spoke the words claimed, of Jenkins' interest, and what it was?

Was there any such question in issue? How can Loewenthal be charged with notice of a remark made *two years* before the treaty, to a person not his lawyer in any treaty, in regard to a matter not in controversy?

Mr. Burgess is both counsel and chief witness in this case, and hence it is my right and duty to treat him as any other witness; and I submit, whether for the purpose of maintaing his case, his testimony is not as crooked as a Virginia rail fence, and as disingenuous as a most interested party could make it.

It, may as well be said here that the recceiver, as such,

never had possession of those premises. (Rec., 897.) He was appointed for the purpose of collecting the rents. (Rec., 959.)

This application was made after the sale, and when the master's deed was executed the purchaser became entitled to the premises, as authorized by law, and the purchaser, Rosenberg, and Loewenthal, one of the *cestui que trust*, and Kinney, who had possession of the premises by his tenant, Hupe (Rec., 569), and claimed the fee, entered into a contract on February 15, 1880, for the purpose of docking and renting said premises, and providing for the re-payment to Loewenthal, who was to advance the money.

5th. Appellants pretend to make this contract of February 15, 1880, one of the grounds of notice to Lowenthal of the pretended rights of Jenkins.

All the parties who supposed themselves to be interested in this property, viz: *Rosenberg* who had the master's deed; *Loewenthal*, one of the parties interested under that deed, and who represented Bauer, Schoellkopf and the bank, and Mr. *Kinney*, met together, and they came to the conclusion, that pending this litigation, it would be desirable to have this property docked and rented, and having come to this understanding they entered into the agreement found on page 795 of the record, and under that agreement, Mr. Barker representing Mr. Kinney, Mr. Rosenberg and Mr. Loewenthal executed leases to Gray, Shepard and Sands.

Mr. Burgess claims that because he and Badger were hanging around and discussing about that contract along with Barker, therefore Loewenthal must have known that they represented Jenkins. Had Loewenthal supposed that they represented Jenkins, or that Jenkins had any interest in the premises, is it to be presumed that he would not have required Jenkins to execute the contract, also, inasmuch as he was to advance $30,000 toward building the docks, and was to be secured and protected ahead of every other person in case the Bauer case should be reversed. How would he have been protected against Jenkins if this decree was reversed, for the money advanced by him, and why not say that it was not necessary to have *Kinney* sign the contract, upon the same theory as that upon which counsel says it was not necessary to have Jenkins sign it?

Now, how utterly absurd it is for counsel to say, and Mr. Burgess did say it and swore to it (Rec., 941), that it was not necessary for Jenkins to sign that contract in order to bind him. Why, then, was it necessary to have Kinney sign it? Does any man, with an honest purpose, say that Loewenthal would not have required Jenkins to sign that contract had he supposed that Jenkins was interested in it?

Mr. Burgess says Jenkins was estopped by his counsel participating and acquiescing. But, do parties of business experience trust to equitable estoppels when it is quite as easy to have the agreement in writing and signed? It is too absurd. The court will please read the testimony of Mr. *Barker*, the counsel for Kinney, and who was also in the litigation one of the counsel for Jenkins. (See Rec., 835.) Barker negotiated the contract

for Kinney, and on his behalf, and openly and in a manly way, said whom he represented, and who claimed the property. See, also, the testimony of Loewenthal, Ahrens and Glidden, and, in fact, of Badger and Burgess also, and it is too apparent for controversy that Jenkins' name was never mentioned, and only Kinney was the party whose interests were to be protected under this contract, and yet Mr. Burgess now pretends, although he then was working for Kinney alone as to these premises, and then had the contract with Kinney in his pocket for his contingent fees, he now pretends he did also in his mind represent Jenkins. Listen to what this witness says:

"Just what the conversation was, or what was said, "that might advise these parties that were there of the "fact that I was appearing for Jenkins, and taking care "of his interest in the matter, I cannot now recollect; "that I was there and represented Jenkins as assignee, "and, to some extent also Mr. Kinney, because at that "time I was employed by Mr. Kinney in his suits in "connection with this matter, I have little doubt.

"The wording of the contract itself is, to my mind, "confirmatory of the fact that the parties knew I was "acting for Jenkins. * * That, in connection with "the fact I had given notice to Mr. Pence about a "month before that Jenkins did claim an interest in these "premises."

A lawyer turned witness, and instead of giving evidence, giving conclusions, and not daring to say that he told anybody that he represented Jenkins then at the signing of that contract.

And on cross-examination he says: "*I will not say*

"that while the Kinney, Loewenthal and Rosenberg "contract was being transacted, I recollect definitely of "telling Loewenthal that I represented Jenkins, but Mr. "Loewenthal and Mr. Ahrens must have understood it. "I did not see Rosenberg; he was a figure-head. * * * "*The only reason I know why he (Jenkins) was not made* "*a party was to avoid trouble; I had scarcely any conver-* "*sation* with Loewenthal.

"Q. As a lawyer, Mr. Burgess, you know that in "order to bind Mr. Jenkins it was necessary for Mr. Jen- "kins to be a party to that contract?

"A. No, sir. Mr. Jenkins stood by and assented to "that contract, and was as much bound by it as though "he was a party to it, for the reason that he allowed the "mortgagee in possession to go on and make improve- "ments. I do not think that Mr. Jenkins should (need) "be made a party to it."

Now, just listen to that. In order to surmount the difficulties of the case he is willing to fall back upon an *equitable estoppel*, which always involves a fraud, or a false representation, and parties are held by equitable estoppel, because it would be a fraud to let them aver the truth.

What a sorry figure a lawyer will cut as a witness, when his necessities and interest requires that he should create a case. He does not seem to understand that his testimony is the strongest possible evidence that Loewenthal did not know that Jenkins was claiming any interest as against Kinney. Why, he admits that as between Jenkins and Kinney, Jenkins would be bound. And I wonder if he does not see that Loewenthal, claiming

under Kinney, would secure the benefit of such estoppel, being a privy in estate. Are parties to be deprived of their property on such thin pretenses and double dealings. Loewenthal and Ahrens both testify that not one word was said by any one that Burgess was representing Jenkins in the matter of that contract, or that any one claimed it. (Rec. 905, 965.)

The fact is that Mr. Burgess never dreamed of representing or asserting Jenkins' claim to this property until after Loewenthal had bought out Kinney.

This transaction instead of being notice to Loewenthal of any interest in Jenkins, is an estoppel upon Jenkins to assert that he has now any interest in said premises when by his very actions he led Loewenthal to believe that only Kinney had an interest, and hence the maxim, that the man who keeps silence when it was his duty to speak shall not be heard to speak when honesty requires that he should be silent.

Mr. Jenkins, having seen Mr. Kinney deal with this property as his own and keeping silence, and having seen Loewenthal pay his money upon the basis that it was Kinney's property, will be estopped now to dispute Kinney's right to sell the same.

Bigelow on Estoppel, 437.

6th. And appellant's last point is that on June 19, 1878, before Mr. Jenkins was appointed as assignee, he, as custodian or provisional assignee, after the final decree in the Circuit court, filed a bill in United States court seeking

to go over the same thing again, in which he set out the various pleadings in the Bauer case.

It is quite impossible to see the application of this point. The bankrupt law does not know any such officer as provisional assignee. He is only a custodian of the court to take possession of and protect personal property. He has no title to any thing, and cannot litigate any question. There is no authority of law for any such proceeding.

The bill filed by him was dismissed by the United States court. In the bill filed by him he set out all the proceedings in the Bauer suit. Among others, he set out the allegation in the Bauer bill which alleges that Kinney was the purchaser and owner of the equity of redemption of the premises in question (Rec. 544). There was much other property contained in the decree in the Bauer suit besides the property in question. He nowhere alleges that Walker had any interest in these premises. The bill was dismissed and no one claims any title under it. It was personally signed and sworn to by Jenkins, and it was introduced by appellees for the purpose of showing that Jenkins personally signing and swearing to said bill necessarily had knowledge of the claim made that Kinney was the owner of said pemises and Walker's knowledge of the allegation.

To what use Jenkins puts the fact of filing that bill by him in the United States court is beyond our ken. There can be no pretense that he was claiming title to these premises by that bill. Whatever he did claim thereby was as provisional assignee. And there was no privity between a provisional assignee and regular assignee. John Smith might have been regular assignee, and there would have been no connection between the two. The sole

object of that bill, if it had any, was for another account, and in no manner was there any allegation or issue made as to the ownership of this equity of redemption between him and Kinney. Kinney was not even made a party thereto. Why should counsel claim that this assignee thereby made or set up any claim to these premises.

These are the only points made by appellant whereby he charges that appellees had notice of the claim now asserted by them.

Besides the answers given above, the following proposition of law can be invoked as a complete answer to anything brought forward by him:

III.

Notwithstanding the defect or rather entire want of proof of notice, either actual or constructive, it is a principle that when circumstances are sufficient to put upon inquiry, such circumstances may be repelled by other circumstances.

Chadwick v. *Clapp*, 69 Ill., 125.

In the case cited this court said:

"In the editor's note to the case of *Le Neve* v. *Le Neve*, "on pages 156 and 157, Vol. 2, part 1, Leading Cas. Eq., "where this subject of notice is fully treated, it is said: "'Where circumstances are brought directly home to "the knowledge of the purchaser, which would have "been sufficient in themselves to put him on inquiry, "and thus amount to notice, he will be entitled to rebut "the presumption of notice, which would otherwise arise,

"by showing the existence of other and attendant cir-
"cumstances of a nature to allay his suspicions, and lead
"him to suppose the inquiry was not necessary.'

"Whatever presumption of notice might be thought to
"arise from the circumstances in evidence, we would
"regard it as having been sufficiently rebutted in the
"manner above named."

The rebutting circumstances as to notice are the following:

(*a*) The bill filed by Kinney in the United States court in 1874, alleging that he owned the title to these premises, and Walker's answer thereto, admitting the same. Loewenthal and the bank were parties thereto. The bill proceeded upon the basis that Kinney was the owner, and that these securities so held by appellees should be removed as a cloud upon his title. (Rec., 517, 537.)

Loewenthal, a co-defendant with Walker, both being brought into court by service of process, saw Walker admitting of record, in answer to an issue tendered, that he, Kinney, was the owner of said premises. (Rec., 529.)

(*b*) The absolute answer of Walker to the Bauer bill, admitting the absolute character of the conveyance to Kinney. (Rec., 429.)

(*c*) The answer and cross-bill of Kinney in the Bauer case after the final decree of April 25, 1878, in which he specially alleges that he was the absolute owner in fee of said lots, and Jenkins' knowledge thereof, Burgess and Barker being attorneys for Jenkins and Kinney at the same time. (Rec., 465, 473, 485.)

(*d*) The deeds themselves to Kinney from Walker. They were absolute upon their face. (Rec., 736, 741.)

(*e*) The trust deed of Kinney to Kyle and Dunham, in which Kinney covenants that he is the absolute owner. (Rec., 745.)

(*f*) The possession by Kinney and the payment of rent to him. (Rec., 524, 196.)

(*g*) The contract between Kinney, Loewenthal and Rosenberg for the docking and renting of the property, with the actual knowledge of Jenkins, and the presence of Jenkins' attorneys without one word from them as to any interest in Jenkins. By the affirmative assertion of Barker, one of Jenkins' attorneys, who in this matter represented Kinney as the owner, procured Kinney to sign the contract, and himself signed leases, under the contract, as the attorney in fact of Kinney, and during all this time being the attorney of Jenkins. Jenkins knew what he was doing, and yet acting in this matter as the attorney of Kinney, without giving any information that Jenkins claimed anything on the property. (Rec., 836–847)

These are circumstances which would rebut the pretended *constructive* notice, which they claim ought to have put him upon inquiry. But we have shown that none of them amount to constructive notice, and hence, no rebuttal is necessary.

Titles cannot be taken away so readily. They are made of more enduring material.

As to the pretense that Loewenthal did not pay the full value of this property, it would be pertinent here to remark, that should Mr. Kinney raise the question, it would

be time to answer it. But the answer is plain. The amount of the decree under which these premises have been sold by the master was about $70,000, with interest at six per cent. from April 15, 1878. Add these two and one-half year's interest, and we have $80,000.

Remember, also, that the master's deed had been made, the property had passed redemption, and the only hope for Kinney was that the decree would be reversed, which it was not at that time, March, 1880. Add $20,000 to the amount of the decree and interest, and it makes $100,000. Add $30,000 for docking, and it makes $130,000.

Now, it is notorious that while money only loans at six per cent., yet that capitalists will not put their money into real estate unless it yields at least ten per cent. per annum, for from the gross income must be deducted insurance, taxes, which almost wholly fall upon real estate in our cities, and the wear and tear, and loss by fire of improvements. Hence, it becomes necessary to receive as an income a much larger rate. There is no proof of the actual value of these premises. But a gross income of $12,000 per year, computing interest at ten per cent., would make the premises now worth $120,000. But the decree found the total indebtedness due the bank at $174-000. All of which under the general collateral agreement was a lien upon these premises. But this was a compromise. On one side, Kinney would get nothing if the decree of the court were affirmed, as the master's sale had passed redemption. And if it were reversed, there was little hope that the decree would be materially less in amount. And hence Mr. Kinney, as a business man, saw clearly that $20,000 in hand was much better than the

uncertainty of the result in the Appellate court, on the one hand, and the certainty of a large champertous fee of $12,000, on the other hand, in case of success. (Rec., 806.)

Who will say that Kinney was not wise in getting out of the hands of his lawyers with $20,000 cash in hand, and rid of all litigation? But what business has Mr, Jenkins with the goodness or badness of Kinney's settlement?

IV.

The decree of April 25, 1878, in the Bauer case, foreclosing and ordering sale of premises in question, was affirmed by the Appellate court November 22, 1880, as to Kinney. (~~Rec., 732.~~)

Walker not having raised an issue in the Circuit court as to the ownership of these premises, but having admitted the allegation in the Bauer bill asserting the ownership in Kinney, his assignee cannot now be heard to question the decree rendered against Kinney upon that issue after it is affirmed, and after the sale to Rosenberg, and master's deed in pursuance of that decree.

The decree of the Appellate court at the succeeding March term (~~Rec., 267~~) reversing the entire decree as to Jenkins (which included much else besides these premises, ~~Rec., 597~~) could not operate to change the final decree as to these premises, and the title acquired thereunder through Kinney.

(*a.*) Because one person cannot assign an error against another, and under the issues if Kinney did not complain,

Jenkins can have no relief affecting the rights of another. The relief sought by him, and which was granted to him by operation of law, was only commensurate with the issues in this cause.

(*b.*) Because a final decree as to Kinney could not be vacated by the Appellate court at a subsequent term.

(*c.*) Because the decree was reversed, and the reversing as to one upon errors assigned would not reverse as to another.

V.

The decree of the Circuit court was ordered by that court to stand *confirmed* as against Kinney on November 22, 1880, prior to reversal by Appellate court, and after the said writ of error from Appellate court was sued out. This order by the Circuit court was entered by virtue of section 19 of the chancery act. Until the order confirming the decree of April 25, 1878, was entered, it was only *provisional* or interlocutory as to Kinney, a non-resident, and was not final, so as to be reversed by writ of error as to Kinney.

Lyons v. *Robbins*, 46 Ill., 276.
Southern Bank v. *Humphreys*, 47 Ill., 227.

There has been no appeal from that confirmatory order, and considering the issues in that case, how can it be claimed that we do not hold the absolute title by the master's deed to Rosenberg?

VI.

LIMITATION UNDER UNITED STATES STATUTE.

This suit was not brought within two years after the cause of action accrued to the assignee.

Section 5057 Rev. Stat. U. S. reads as follows:

"No suit, either at law or in equity, shall be main-
"tainable in any cause between an assignee in bankruptcy
"and a person *claiming an adverse interest, touching any*
"*property or right of property* transferrable to, or vested
"in such assignee, unless brought within two years from
"the time when the cause of action accrued for or
"against such assignee."

Jenkins was appointed assignee July 31, 1878 (Rec., 2). His cause of action, if any, then accrued. He brought this suit May 27, 1881, nearly three years afterwards.

The Supreme court of the United States, in *Bailey* v. *Glover*, 21 Wall., 342, construes that limitation law in the following language:

"Counsel for the appellant argues that the provision of
"the second section of the bankrupt act has no applica-
"tion to the present case, because it is not shown that the
"defendants have set up or *asserted any claim* to the prop-
"erty now sought to be recovered, *adverse* to that of the
"assignee. It is rather difficult to see exactly what is
"meant by this proposition. The suit is brought to be
"relieved from some supposed claim of right or interest
"in the property on the part of the defendants. If no
"such claim exists, it does not stand in the way of com-
"plainant, and he does not need the aid of a court of

"equity to set it aside. If it is intended to argue "that until some one asserts in words that he claims a "right to property transferred to the assignee by virtue "of the act, which is adverse to the bankrupt, the statute "does not begin to run though such person is in posses- "sion of the property, acting as owner, and admitting no "other title to it, we think the construction of the proviso "entirely too narrow.

"This is a statute of limitation. It is precisely like "other statutes of limitation and applies to all judicial "contests between the assignee and other persons, touch- "ing the property or rights of property of the bankrupt "transferrable to, or vested in the assignee, where the in- "terests are adverse, and have so existed for more than "two years from the time when the cause of action ac- "crued for or against the assignee. Such is almost the "language in which the provision is expressed in section "5057 of the Revised Statutes.

"It is obviously one of the purposes of the bankrupt law, "that there should be a speedy disposition of the bankrupt "assets. This is only second in importance to securing "equality of distribution. The act is filled with provisions "for quick and summary disposal of questions arising in "the progress of the case, without regard to usual modes "of trial attended by some necessary delay. Appeals, in "some instances, must be taken within ten days, and pro- "visions are made to facilitate sales of property, compro- "mises of doubtful claims and generally for the early dis- "charge of the bankrupt and the speedy settlement of his "estate. It is a wise policy and if those who administer "the law could be induced to act upon its spirit, would do "much to make the statute more acceptable than it is.

"*But, instead of this, the inferior courts are filled with "suits by or against assignees, each of whom, as soon as ap- "pointed, retains an attorney if property enough comes to "his hands to pay one, and then instead of speedy sales, "reasonable compromises and efforts to adjust differences, "the estate is wasted in profitless litigation, and the fees of "the officers who execute the law.*

"To prevent this as much as possible, congress has "said to the assignee, you shall commence no suit two "years after the cause of action has accrued to you, nor "shall you be harassed by suits when the action has ac- "crued more than two years against you. Within that "time the estate ought to be nearly settled up and your "functions discharged, and we close the door to all litiga- "tion not commenced before it has elapsed.

"But the appellant relies in this court upon another "proposition which has very often been applied by the "courts under proper circumstances, in mitigation of the "strict letter of general statutes of limitation, namely, that "when the object of the suit is to obtain relief against a "fraud, the bar of the statute does not commence to run "until the fraud is discovered or becomes known to the "party injured by it.

"This proposition has been incorporated in different "forms in the statutes of many of the states, and pre- "sented to the courts under several aspects where there "were no such statutes. And while there is unanimity in "regard to some of these aspects, there is not in regard "to others.

"In suits in equity, where relief is sought on the ground "of fraud, the authorities are without conflict in support "of the doctrine that where the ignorance of the fraud

"has been produced by affirmative acts of the guilty "party in concealing the facts from the other, the statute "will not bar relief, provided suit is brought within proper "time after the discovery of the fraud. We also think "that in suits in equity the decided weight of authority is "in favor of the proposition that where the party injured "by the fraud remains in ignorance of it without any fault "or want of diligence or care on his part, the bar of the "statute does not begin to run until the fraud is discov- "ered, though there be no special circumstances or efforts "on the part of the party committing the fraud to conceal "it from the knowledge of the other party. * * *

"While we might follow the construction of the state "courts in this matter, where those statutes governed the "case, in construing *this* statute of limitation passed by "the Congress of the United States as part of the law of "bankruptcy, we hold that where there has been no neg- "ligence or laches on the part of a plaintiff in coming to "the knowledge of the fraud, which is the foundation of "the suit, and when fraud has been concealed, or is of "such character as to conceal itself, the statute does not "begin to run until the fraud is discovered by, or becomes "known to, the party suing, or those in privity with him."

In the light of the statute and of the case cited, did Kinney claim *adversely*, and did Jenkins know that he claimed adversely, or was he put upon inquiry which would have led him to such knowledge had he not been guilty of negligence or laches in prosecuting such inquiry, more than two years prior to the commencement of such suit?

Now, then, his right to redeem, if it existed, it is admitted he knew at once. He, however, does not claim

the right to redeem, but he claims that we assert an adverse claim to the premises in question under certain deeds, and that it is a cloud upon his title which he seeks to remove, and asks that our deed be adjudged a nullity. (Rec., 33.)

That this claim to these premises was asserted by Kinney adversely to the rights of Walker in the premises, and adversely to the rights of Walker's assignee, for more than two years prior to this suit, we think it would be folly to question.

Prior to the bankruptcy of Walker, Kinney filed a bill in the United States court against the International Bank, Loewenthal and Walker, in which he asserted his absolute ownership to these premises, and which bill Walker filed his answer admitting Kinney's absolute ownership. (Rec., 517, 528.)

This bill was still pending when Walker went into bankruptcy and when Jenkins was appointed assignee, and was not dismissed until July 6, 1880. (Rec., 585.)

An assignee is a volunteer and comes in under the bankrupt and is chargeable with notice of all judicial proceedings pending against the bankrupt, and is bound thereby.

Eyster v. *Gaff*, 91 U. S., 521.

Kinney was in the possession of said premises receiving rents therefor when Jenkins was appointed assignee, on July 31, 1878. (Rec., 570.) And he remained in possession thereof up to February 15, 1880, and then Kinney, Loewenthal and Rosenberg remained in possession thereof. It is not true, as stated by counsel, that Loewenthal was ever in possession thereof as receiver. (Rec., 899, 570.) This was notice to Jenkins of Kinney's adverse claim.

Kinney made a mortgage to Kyle & Donham of the premises in question, bearing date March 1, 1878, recorded April 6, 1878. (Rec., 745.) In that mortgage Kinney covenants *that he is the true and lawful owner of the said premises.*

Jenkins, as assignee, claims under Walker, and when he was appointed assignee, July 31, 1878, this mortgage was on record. A purchaser or other person taking title, is chargeable with notice of all instruments lying in his chain of title, and their contents. So we see Jenkins, from the date of his appointment, had notice and was put upon inquiry as to the claim of Kinney.

When Kinney was let in to defend the Bauer suit, Burgess & Barker appearing as his attorneys, and at the same time being the attorney of Jenkins pertaining to the same litigation in the Appellate court, filed his answer July 26, 1878, and filed his cross-bill April 21, 1879, in both of which he set up and alleged that he was the absolute owner in fee of said premises. (Rec., 465, 485.)

Jenkins not only had constructive notice through his attorneys, but had actual notice of this *claim of Kinney's* in his pleadings.

Jenkins, as provisional assignee, filed his bill in the United States court June 19, 1878, in which he recited the allegations in the Bauer bill to the effect that Walker had conveyed said premises *absolutely* to Kinney, and also set out the substance of Walker's answer.

This bill he signed personally, and personally swore that he knew the contents of it. (Rec., 544.) The abstract does not show that he personally signed and swore to that bill, but he did, all the same, as the record will show.

He cannot now deny that he did not know of the claim asserted by Kinney and admitted by Walker, for he has sworn that he did know the same.

Jenkins knew of the contract entered into on June 17, 1878, between Kinney and Badger with reference to the prosecution of that suit, and for which Badger, Burgess and Barker were to receive $12,000, in which contract it is recited that Kinney was the absolute owner of said premises. (Rec., 806.)

Jenkins knew of the negotiation between Kinney, Rosenberg and Loewenthal, and of the contract entered into for the docking of said premises, and knew that Kinney executed that contract, *claiming* to be the owner of the equity of redemption of said premises. That contract was made February 15, 1880, and hence was not two years before the bringing of the suit, but all the other facts enumerated were known by Jenkins, more than two years prior to the bringing of this suit, and this last contract simply shows that Jenkins knew prior to that time of Kinney's claims, and that Kinney's action in the matter was nothing new, but entirely in harmony with all his acts.

Within the decision of the Supreme court of the United States, did Jenkins know of this adverse claim on the part of Kinney for two years prior to bringing this suit? If Jenkins was ignorant of this claim of Kinney, "did he remain ignorant of it without any fault or want of diligence or care on his part," or did Kinney conceal his claim, or was it of such a character as to conceal itself? We need not discuss this question further. The above facts show that Jenkins had knowledge and

notice of this adverse claim ever since his pretended cause of action arose.

But counsel for appellant contends that the same evidence is required in this case, of an adverse claim as is required to establish an adverse possession of land as against a mortgagor out of possession. This statute is of an entirely different character from a statute of adverse possession. This is a statute of adverse claim, and not a statute of limitation by adverse possession. All the cases cited by appellant's counsel are cases as to the application of a statute of adverse possession, under an adverse claim, and such cases have no application. There is a very great difference between an adverse claim and an adverse possession, under an adverse claim.

The case of *Bailey* v. *Glover*, above referred to, illustrates, and explains the meaning of the statute under consideration.

In that case a man made a fraudulent assignment of his property before going into bankruptcy, and the bill was filed by the assignee to set aside and declare null and void such transfer, just as the party here has done.

The defendant demanded and insisted upon the application of the statute as a bar. Mr. Justice MILLER, in delivering the opinion, said:

"Counsel for appellant argues that the provision of the "second section of the bankrupt act (now section 5057), "has no application to the present case, because it is not "shown that the defendants have set up or *asserted any* "*claim* to the property now sought to be recovered "*adverse* to that of the assignee. It is rather difficult to "see exactly what is meant by this proposition. The

"suit is brought to be relieved from some supposed claim "of right or interest in the property on the part of the de- "fendants.

"If no such claim exists it does not stand in the way "of complainant, and he does not need the aid of a court of "equity to set it aside.

"If it is intended to argue that until some one asserts "in words that he claims a right to property transferred "to the assignee by virtue of the act, which is adverse to "the bankrupt, the statute does not begin to run, though "such person is in possession of the property, acting as "owner and admitting no other title to it, we think the "construction of the proviso certainly too narrow."

Why, the very foundation of this suit is that we assert an *adverse claim*, and the aid of the court is invoked to remove this claim out of appellant's way; and now the appellant claims that it is not an adverse claim, and hence that the statute does not apply. As was stated by the Supreme court in the Bailey case, "it is rather difficult "to see exactly what is meant by this proposition."

The statute says that the two years shall be a bar to a suit brought by the assignee against a person *claiming an adverse interest touching any property or rights* of property. It is entirely different from the twenty years statute of adverse possession. The claimant in this case need not have an adverse possession at all, but only an adverse claim.

There really can be no doubt whatever of the applicability of this statute as a bar.

VII.

Another ground for the application of the United States statute of limitation of two years is a deed made by Jacob Rosenberg to the International Bank on *April 15, 1876*, and recorded *Jany. 13, 1877*. (Rec., 783.) The title to Rosenberg of the premises in question, which was conveyed by him to the bank was a tax title, conveyed to him March 22, 1876. *Recorded March 25, 1876*. (Rec., 779.)

Of this title Jenkins, the assignee, had notice by the record on July 31, 1878, the date of his appointment and conveyance to him.

This title was an adverse claim touching this property, and it was set up in our answer as a bar to this suit. By amendment to his bill appellant sought to set aside this title, and the issue was made against it. (Rec., 138.)

The conveyance to the bank by Rosenberg was for the benefit of the bank, Bauer, Loewenthal and Schoellkopf, the same appellees.

We do not conceive how appellant can contend that it makes any difference whether this tax title was valid as a paramount title.

If it were necessary to show it a paramount title, then the statute of limitation would be quite useless, for it is unnecessary to rely upon a limitation when the paramount title is in the defendant. It is only when the claim of title is not good as a paramount title the statute of limitation is of any consequence.

Under the seven years statute of limitation, of 1839, a

tax title has always been held to be a good claim of title. All that the statute in question requires is, that there should be an adverse claim, and whether that claim be well or ill founded, is of no consequence. And if the suit be not brought within two years, such claim ripens into a complete bar.

VIII.

Mr. Jenkins, assignee of Walker, comes into a court of equity and does not offer to do equity. He does not offer to pay the indebtedness held by Kinney. He does not offer to pay the purchase money paid by Loewenthal. He does not offer to pay the money put into the improvements. He does not offer to redeem.

The bill was properly dismissed, upon this ground. The sole object of the bill was to set aside the Loewenthal title as a cloud; to have it declared a nullity. (Rec., 33.) The best evidence of the scope of their bill is appellant's own estimate of it. He appeals direct to this court, because a *freehold is involved*, while, had it been a bill to redeem, he would have appealed to the Appellate court. Appellant throws out a suggestion that the court might reverse the case, in order to enable him to offer to do equity.

This court decides cases upon the issues made and not upon issues which might have been made. Besides, it is a question whether this court could pay any attention to a question, unless only incidentally involved, which falls only within the jurisdiction of the Appellate court. This

court would not have had jurisdiction of this case, as decided in *Fleischman* v. *Walker*, 91 Ill., 318, had the issues been made up, on the basis of a right to redeem, for then a freehold would not have been involved.

How, then, stands the case upon the basis that appellant has not offered to redeem? Counsel contend that a grantee of a mortgagee without assignment of the debt takes no title; that his deed is a nullity.

Upon this branch of the case we desire to quote the able opinion of Judge TULEY, who tried the case.

Opinion by TULEY, J.:

"Now in some of the states what is known as the com-
"mon law system of mortgages prevails. Where that is
"the case a mortgage assumes a dual character: One
"character in a court of law, and another in a court of
"equity. It is a conveyance of real estate in a court of
"law—certainly after condition broken—treated as a con-
"veyance passing the estate in the land; and in a court
"of equity it is treated as a mere security for a debt until
"there is a foreclosure. After default in payment the
"authorities hold that the estate at law vests in the mort-
"gagee; but although the estate vests in the mortgagee
"at that time, in equity it is treated as a mere security
"for the debt. But in some of the states the common
"law rule has been so modified that the equitable doctrine
"has entirely superseded that of the common law. In
"several of the states this is the case, and where that is
"the case, the mortgage, both before and after condition
"broken, is regarded as a mere lien upon the property,
"a mere security of a personal nature, that passes no es-
"tate in the land whatever. The title remains in the

"mortgagor under that class of cases until foreclosure, "subject only to the lien of the mortgage, and the mort- "gagee is regarded until then as having no legal interest "whatever in the mortgaged premises. In fact, it is said "to be a mere chattel interest, and a chattel interest in- "separable from the debt. This is the rule in New York, "California, Indiana and other states. And in some of "the states that rule is established by statute. It is pro- "vided by statute that the equity rule shall prevail, and "that the mortgage shall pass no interest whatever in "the land, but shall be treated as a mere security, or a "chattel interest inseparable from the debt. Where the "equity rule prevails, either by statute or by decisions of "courts, treating the interest created by mortgage as a "mere lien of a personal nature, it can only be assigned "by a transfer of the debt; and a conveyance of the land, "or an assignment by the mortgagee of the mortgaged "premises without specifically assigning the debt, or what "is equivalent to an assignment of the debt, would be "void—an absolute nullity. This distinction of the man- "ner in which mortgages are treated in the different "states is discussed by Jones, in his work upon Mort- "gages, and by Mr. Washburn. It is recognized as run- "ning through the decisions.

"The distinction is marked in the decisions of the var- "ious states, and if kept in the mind relieves the decisions "of the courts of various states of a great many apparent "contradictions.

"To which class does Illinois belong? Have we the "common law system which recognizes an estate in the "land created by the mortgage, or the equity system "which recognizes a mortgage as a security merely, "creating no legal interest whatever in the land.

"In our state it is clear that we have followed the com-
"mon law system, and that the common law rules appli-
"cable to mortgages have been adopted. It has been
"held that the mortgagee is the owner of the fee in this
"state, and, after condition broken, may maintain eject-
"ment against the mortgagor. That is expressly decided
"in *Johnson* v. *Watson*, 87 Ill., 538. *Fisher* v. *Williams*,
"94 Ill., 328.

"And this rule that the mortgage conveys an estate in
"the land to the mortgagee, which, after condition broken,
"he may enforce against the mortgagor, or any other per-
"son, and may use in such way as may be necessary for
"the security of his debt, but in no other way, has been
"recognized as the law of this state ever since the case of
"*Carroll* v. *Balance*, 26 Ill., 9, which was an action of
"ejectment, and the broad common law position is laid
"down there and has been followed by *Harper* v. *Ely*
"70 Ill., 581, and *Erickson* v. *Rafferty*, 79 Ill., 209, and
"other decisions.

"This legal title or estate is held only as security for a
"specific purpose, that is, for the payment of a debt, and
"as against all persons but the mortgagee, the mortgagor is
"regarded as holding the legal estate. The mortgagor
"may deal with it as his own, subject only to the legal
"title of the mortgagee, and subject only to that legal
"title so far as it may be necessary for the security of the
"mortgagee.

"Where the equitable view of the mortgage prevails a
"conveyance cannot be made, except by passing the debt
"or the evidence of the debt. Therefore a deed of land
"or an assignment of the mortgage is a nullity. But
"where the common law system prevails, the interest in

"the land, which, in my opinion, will carry with it an "equitable assignment of the debt, may pass by an as- "signment of the mortgage or conveyance of land, if such "was the intention of the parties—not that it necessarily "passes, but it may pass.

"In the states where the common law system prevails, "it has been repeatedly held, after condition broken, or "where the mortgagee is in possession, an assignment of "the mortgage or a conveyance of the land may be effec- "tual to pass all the interest of the mortgagee, both in the "land and in the debt. That is clearly laid down in the "case of *Johnson* v. *Leonard* 68 Me., 239, and other "cases.

"It is said in *Pickett* v. ———, 63 Mo., 199, that "while most of the courts hold, generally, that the trans- "fer of a mortgage without that of a debt secured is an "absolute nullity, the rule should be subject to this quali- "fication; that where the mortgagee had possession by "virtue of his mortgage, or where the mortgagee is not "in possession, but the condition has been broken, a con- "veyance or assignment of the mortgaged premises would "be valid to transfer his right of possession.

"And in the case of *Philips* v. *The Bank*, 18th "Pa. *St.*, which was a case where the debt had been se- "cured by a note, and part of the evidence of the debt "was in a judgment, and part of the evidence of the debt "was in another judgment, further secured by a mort- "gage, the court says: 'The rule of common sense is the "'rule of law on this subject, and the assignment of the "'mortgage is an assignment, not only of the claim against "'the mortgagor, but of all the securities which the assignor "'may hold against him or other parties for the same "'debt.'"

Then, in this case, if the deed of Mrs. Kinney, to whom the land had passed, the condition being broken—that is, the debt being past due, and there being default in payment—and the mortgagee in possession, as the evidence shows in this case, of at least part of the premises, did operate to pass a legal estate, and one which under the decisions cited would authorize an ejectmemt if out of possession, it would certainly give the party holding the legal estate, even in a proceeding in equity, the right to demand as against the mortgagor, the payment of the debt —the performance of the only condition which could destroy that legal estate. * *

"In my opinion this must be made to appear to have "been the intention of the parties, and in the absence of "proof, the presumption would be that it was intended to "pass the debt as well as the land. This certainly must be "the rule as between the assignor and his assignee. The "assignor would not be permitted to set up the debt re- "maining in his hands as a lien upon the lands and make "his assignee for value his trustee without clear and ex- "press proof that such was the intention of the parties.

"If the evidence of the debt had been assigned for value "before the conveyance, then I have no doubt the assignee "of the debt could treat the grantee of the mortgaged "premises as his trustee. But the evidence in this case of "Kinney shows that when he conveyed the property he in- "tended to convey all his interest in the land as mortgagee "or otherwise; that he did not intend to reserve his debt "against it, and transfer to his wife nothing but an empty "shell. It appears that Mrs. Kinney received through one "Burgoyne a deed of these premises, she surrendering in "consideration thereof her dower interest in considerable

"other real estate. Her husband made the deed to Bur-
"goyne, and the other members of the firm to which he
"belonged also joined in the deed, and then they transferred
"to Mrs. Kinney, and she surrendered, in consideration, her
"dower interest in other property. Now it is hardly to be
"presumed that the intent of the husband, in that case, was
"to give his wife the entire naked legal estate to hold in
"trust for the party to whom these evidences of indebted-
"ness might be transferred. What Kinney intended to
"transfer to his wife, it is evident that Mrs. Kinney in-
"tended to transfer the same to Loewenthal.

"But after all, like all other contracts, the question here
"is one of intention. The key-note of inquiry is, what
"was the intention of the parties? Tested by this rule,
"can there be any question but that Loewenthal intended
"to buy, and supposed he was buying, all Kinney's inter-
"est that had passed to his wife in this property? Would
"it not be absurd to say that he knew there was an out-
"standing debt, that Kinney's deed was a mortgage, and
"yet he intended to pay $20,000 for the naked legal title
"to hold it in trust for the owner of the debt? Isn't it
"absurd to say that neither Mrs. Kinney nor Mr. Kinney
"intended to transfer all their interest in the land?

"Let us get at the intention of the parties by the sur-
"rounding circumstances. Consider the position which
"Loewenthal and those he represented stood in regard
"to this property. Holding a first mortgage on this
"property, upon which a decree for over $100,000 had
"been rendered, on a bill alleging Kinney to be the owner
"of the equity of redemption, that a sale had been made,
"the property purchased in by the parties representing
"the mortgage, the certificate was held by them, and

"nothing remained outstanding except the right to re-
"deem from that sale, so far as the record shows, and
"that they supposed, beyond question—whether charge-
"able with notice or not—that they were dealing with
"the owner of the equity of redemption. They take a
"deed from him." (In point of fact the master's deed had already been delivered.) "Is it not fair to suppose
"that their intention was to obtain all the interest of the
"party from whom they took the deed, and ought not
"the presumption to prevail that both parties intended
"that the deed should pass all her interest in the property?

* * * * * * *

"Where the intention of the parties is that the interest
"in the land should pass, and there is nothing said about
"the indebtedness, I think the decisions warrant the posi-
"tion that the transfer of the land is, in equity, an equit-
"able transfer of the mortgage debt.

"Now, in this case, there is no *bona fide* holder of these
"notes for value, before conveyance of these premises.
"The notes, so far as the evidence shows, are the prop-
"erty of Kinney himself. He, having conveyed the land
"by deed, absolute in form, could not be permitted in a
"court of equity to set up—and in fact he is not attempt-
"ing so to do—the claim that the land is obligated for the
"payment of the notes. Certainly, he could not be per-
"mitted to set that up without clear proof that it was the
"intention of the parties that nothing should pass except
"the naked legal title to the land.

"Now the assignee stands in Mr. Walker's shoes. His
"position here is just this: He comes into a court of
"equity, and says: 'I don't propose to pay this mortgage
"debt. I want this land. I want it divested of the mort-

"gage. I want it divested of the debt.' And he insists "that he has a right to take it entirely divested of the "mortgage debt. To me, there is no honesty in this "effort of the assignee of the mortgagor to take and hold "this land without the payment of this mortgage debt; "and if it is not honest it cannot be equitable.

"If this bill was filed here making Loewenthal, the "holder of the legal title, a party, and Kinney, the holder "of the note, or the evidence of the debt, also a party, "and they offer to pay the debt to whoever was entitled "to it, it would be an honest position, and an equitable "one on the part of this assignee; and upon a bill of that "kind filed, in the absence of proof of the intention of "the parties to separate the land from the debt, and it "should be held that the assignee of the mortgagor was "entitled to redeem this land upon the payment of the "debt, there could be little doubt, as between Loewenthal "and Kinney, where a court of equity would decree that "the money should be paid. Undoubtedly the decree "would be that it should go to Loewenthal."

In *Muir* v. *Berkshire*, 52 Ind., 152, the court said:

"Although the deed of Holman did not convey a good "title to James Muir, yet it conveyed all the interest Hol-"man had in the land at the time, and that interest was "the right to foreclose the mortgage against it, and have "the mortgage debt paid out of the proceeds. We think, "therefore, that the deed operated as an equitable assign-"ment of the mortgage to James Muir."

In the case of *Robinson* v. *Ryan*, 25 N. Y., 326, the Court of appeals of that state said:

"There is no doubt that as to the mortgagors and their

"grantees, or the grantees of Mrs. Ryan, the statutory "foreclosure was utterly void and did not and could not "affect their title or estate or operate so as to convey a "legal title to the premises to the plaintiff. * * The "plaintiff, by bringing this action to foreclose the mort- "gage, concedes that the attempted foreclosure by Horn- "blower was void as to the mortgagors and their grantees, "and that he did not get an absolute title to the premises "by his purchase under the same, but he insists that "these proceedings, and his purchase under the same, "operate as an assignment of the mortgage to him by "Hornblower, and that he thereby got all the rights and "interest of Hornblower as assignee of the mortgage. "In *Jackson* v. *Bowen*, 7 Cow., 13, it was held that a "conveyance by a mortgagee as upon a statute fore- "closure, if the proceedings to foreclose were irregular, "operated as a good assignment of the mortgage, and "the purchaser might claim as assignee of the mortgage. "* * * I think, then, assuming that the answer put "in issue the plaintiff's right and title to the mortgage *as* "*assignee* of Hornblower, that the foreclosure proceeding "and the plaintiff's purchase under it could and did oper- "ate as an assignment of the mortgage to the plaintiff."

In Maine it has always been held that a deed by a mortgagee in possession, without assignment of or delivery of the evidence of indebtedness, will pass the mortgagee's interest in the estate, and enable the assignee to foreclose such mortgage; or where it is the intention of the parties that the quit-claim deed shall be effectual, to carry the mortgagee's interest in the estate, the grantee will be subrogated, and become the equitable assignee of the mortgage.

Johnson v. *Leonards*, 68 Me., 238.

And in that case the court closes as follows:

"The mortgagee, therefore, having conveyed all his in-
"terest in the mortgaged premises to Stockin by his quit-
"claim deed of July 8, 1862, had no remaining estate
"therein to pass to plaintiff by his assignment of Decem-
"ber 29, 1863."

The statement of the case, page 238, is as follows:

"December 29, 1863, Moore assigned his mortgage to
"plaintiff, and endorsed and delivered to her the note
"thereby secured, for which the plaintiff paid him $132.77,
"the sum then due thereon."

If the assignee of the notes could not obtain any interest therein after the first quit-claim deed, so here, Mr. Badger cannot obtain any interest in the Kinney notes by assignment to him after the deed to Loewenthal. If this should be treated as a mortgage, and Loewenthal as having purchased, charged with notice, then Jenkins cannot take the estate without redeeming and paying Loewenthal as the equitable mortgagee, the amount due to Kinney, for which the deeds to Kinney were given as security.

But this appellant utterly repudiates, does not offer to do equity, for it would be of no advantage to him, if he had to pay off Walker's debts secured thereby, and hence he repudiates the right to redeem, and does not ask it, but asks that he have the whole estate back without paying a cent.

As Judge Tuley said in the court below:

"Now the assignee stands in Mr. Walker's shoes. His
"position here is just this: He comes into a court of
"equity and says:

"'I do not propose to pay this mortgage debt; I want "this land. I want it divested of the mortgage debt.' "And he insists that he has a right to take it entirely "divested of themortgage debt.

"To me there is no honesty in this effort of the assignee "of the mortgagor to take and hold this land without the "payment of this mortgage debt; *and if it is not honest*, "*it cannot be equitable.*"

In Vermont it is held by a long line of authorities that the mortgagee in possession after condition broken can transfer his mortgage interest by quit claim deed without assignment of the debt.

In *Hinds* v. *Ballou*, 44 N. H., 620, the court said: "So far as the defendant is concerned, Lewis stood as the "holder of the mortgage and was in possession of the "mortgaged premises, and his deed would transfer his in-"terest in the mortgage, even though it was by a deed of "quit claim."

Lamprey v. *Nudd*, 29 N. H., 304.
Smith v. *Smith*, 15 N. H., 66.
Savage v. *Hall*, 12 Gray, 363.
Carll v. *Butman*, 7 Greenl., 102.
Lawrence v. *Stratton*, 6 Cush., 169.

Kinney was in possession of those premises when he conveyed same to Loewenthal (Rec., 848–855). Under the contract between Kinney, Rosenberg and Loewenthal, leases of the premises were made to Gray & Shepard and Sands, who were tenants of Kinney and Loewenthal, both claiming the equity of redemption; Kinney by virtue of the Walker deeds to him, and Loewenthal under the master's deed to Rosenberg. Prior to that contract Kinney

was in the exclusive possession by his tenant *Hope*. (~~Rec., 570~~). Abst. 57.

In the case of *Brown* v. *Smith*, 116, Mass., 108, Chief Justice GRAY said:

"The deed executed by Fay in his own name, if it was "not a valid execution of the former, and therefore did "not convey an absolute fee, it at least passed the mort- "gagee's title to the grantee. Mrs. Smith, under his "(grantees) subsequent deed to her has either an absolute "title in fee or a title in mortgage; and it is unnecessary "and immaterial to the judgment in this action to con- "sider which it is; for in either alternative, *she being in "possession after breach of the condition of the mortgage*, "the mortgagee, or any other person claiming title under "him, cannot maintain a writ of entry against her."

In other words, the grantee is considered in equity as the mortgagee, though the indebtedness is not assigned.

In *Freeman* v. *McGaw*, 15 Pick., 85, the court said:

"The great question is whether this deed of quit claim "constituted a release and discharge of the mortgage, so "as to let in the intervening attachment of Freeman, and "give it a priority, or a transfer, conveyance and assign- "ment of Handy's interest as mortgagee; and on this "question we are of opinion that this deed did not extin- "guish the mortgage, but was a good and valid assign- "ment of Handy's interest as mortgagee."

In *Welsh* v. *Phillips*, 54 Ala., 309, it was held, as in this state, that after breach of condition for default in payment, the estate at law vests absolutely in the mort- gagee leaving the mortgagor a mere equity of redemp- tion, which courts of law cannot notice, and a conveyance

of the land by the mortgagee will pass the legal title though the debt be not assigned. And the court there also held that "*such a conveyance by a mortgagee operates* "*not only as a conveyance of the land, but an equitable as-* "*signment of the debt.*"

In *Phillips* v. *Bank of Lewiston*, 18 Penn. St., 403, the court said:

"The rule of common sense is the rule of law upon "the subject, and the assignment of the mortgage is an "assignment not only of the claim against the mortgagor, "but of all the securities which the assignor may hold "against him, or the other parties for the same debt. In "*Selfridge* v. *Northampton Bank*, 8 W. & Ser., 311, the "assignment in its language embraced the mortgage "alone, but it was treated by all the counsel, and by the "court as an assignment of the debt."

The case of *Bennett* v. *Delano*, 90 Ill., 533, referred to by Mr. Burgess, depends upon an entirely different proposition. That was an action of ejectment where the plaintiff out of possession claimed under a mortgage by *mesne* conveyances. The deed to the mortgagee must have shown that it was a security for a debt, or the plaintiff must have had notice of it, otherwise the registry laws would have protected him. The question of notice is not discussed, and hence the plaintiff must have had notice.

The decision refers to three New York cases. In New York a mortgage is only a lien or chattel interest and never passes the legal title, even after condition broken.

Runyan v. *Merserau*, 11 John., 534.

Nor can a mortgagee in this state maintain ejectment until after condition broken; that is, until it is shown that

the debt is due and unpaid. Hence, it was decided correctly, that a mortgagee, or one claiming under him by deed, could not maintain ejectment until he showed his indebtedness and that it was unpaid, and he could not show his right to maintain ejectment if he did not show that he was the owner of the debt, or that the condition was broken as to him.

The original mortgagee could not maintain ejectment, if the debt was paid, or if he did not own it.

Hence, the court said that a conveyance by a mortgagee was void *at law;* that the legal title would not be vested in him without proof of condition broken, as to him; that is, proof that he owned the debt and that it was not paid.

But even in New York, as we have seen in *Robinson* v. *Ryan*, 25 N. Y., 324, such a conveyance by a mortgagee will in equity constitute the grantee an equitable mortgagee.

It was correct to say that such a deed was inoperative at law to pass the *legal title*, without proof of condition broken.

Oldham et al. v. *Pfleger*, 84 Ill., 102.
Kilgour v. *Wood*, 64 Ill., 345.

In the Oldham case the court foreclosed a mortgage without any jurisdiction, the writ not having been served on defendants, a stranger to the record obtained title by *mesne* conveyances from the complainant, who was the purchaser. The heirs of the mortgagor brought ejectment, but the Supreme court said no; this is an equitable assignment of the mortgage, and, although the purchaser does not own the notes, he is in possession as equitable as-

signee, and that the heirs could not maintain *ejectment*, but that they might file a bill to redeem. The mortgagee, *Patten*, in that case, bought at the void foreclosure sale and took a master's deed, and he afterwards conveyed to a stranger, without transferring the debt, yet the court held the purchaser under him was the equitable assignee, and that the mortgagor could redeem, but could not treat the deed as void against the assignee in possession. The foreclosure proceeding was a nullity, and was to be treated as if it had never existed.

That is precisely the case on the theory that Loewenthal was chargeable with notice.

The foreclosure in that case was of no value to any one; it gave the mortgagee nothing more than he had before he commenced the suit to foreclose, and his conveyance by deed to defendant was precisely like Kinney's conveyance to us.

Now, had Loewenthal, Kinney's assignee, been out of possession, and had Jenkins, Walker's assignee, been in possession of these premises, and had Loewenthal brought ejectment against Jenkins, then the case of *Bennet* v. *Delano* would have been applicable; for Loewenthal, without the legal assignment of the debt of Kinney to him, could not have claimed that the condition of the mortgage was broken as to him by non-payment of the debt, and hence could not have maintained ejectment; for the deed to him would not have been operative to pass the *legal title*, and at law it could be called a nullity, for it would not have passed the legal title. The case of *Oldham* v. *Pfleger* is exactly the case at bar.

The doctrine is thus laid down in section 339, Jones on Mortgages:

"A purchaser who has knowledge that his grantor, "though holding the estate by an absolute conveyance, "nevertheless is in fact only a mortgagee, acquires a de- "feasible estate only, and it is defeasible upon the same "terms as it was in the hands of the original grantee."

In *Amory* v. *Lawrence*, 3 Clif., 533, Judge CLIFFORD said:

"Where an absolute deed is intended as a mortgage, "a subsequent purchaser, with notice, stands in the place "of an equitable mortgagee."

In cases of voidable foreclosures, under powers in mortgages in this state, it has always been held that the grantee would occupy the position of equitable mortgagee, and would be subrogated to the indebtedness secured by the mortgage.

The bill in this cause was properly dismissed upon this ground alone, that appellant did not offer to do equity.

Having now fully answered the various propositions of appellant, we ask that the decree of the Circuit court be affirmed, and submit this cause without further remark.

Julius ROSENTHAL & PENCE,

Attorneys for Appellees.

CHICAGO, September 12, 1882.